In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-838

UNION CARBIDE CORPORATION, CONSUMER PRODUCTS DIVISION,
Petitioner,

vs.

WINIFRED S. NANCE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Union Carbide Corporation, Consumer Products Division (hereinafter "Union Carbide"), the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit which was entered on July 28, 1976, in Case No. 75-2234, *Winifred S. Nance* v. *Union Carbide Corporation, Consumer Products Division.*

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court for the Western District of North Carolina filed April 28, 1975, are officially reported at 397 F. Supp. 436. The District Court's Order Amending and Supplementing the Findings of Fact and Conclusions of Law filed July 10, 1975, are officially reported at 397 F. Supp. 458. The District Court's Judgment filed October 14, 1975, has not been officially or unofficially reported. The Order of the Court of Appeals suspending all injunctions and staying further proceedings by the District Court pending appeal filed November 10, 1975, has not been officially or unofficially reported. The Opinion of the Court of Appeals dated July 28, 1976, is officially reported at 540 F.2d 718. The Opinion and Order of the Court of Appeals denying the Appellee Nance's Petition for Rehearing entered on September 23, 1976, has not been reported officially or unofficially. Copies of all Opinions and Orders referred to above are included in the Appendix attached hereto.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 28, 1976. Respondent's Petition for Rehearing and Suggestion for Rehearing *en banc* was denied by Order and Opinion of the Court of Appeals entered September 23, 1976. Jurisdiction to review the decision of the Court of Appeals by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the protection that is given to a bona fide seniority system by Section 703(h) of Title VII extends to a company or plant-wide seniority system which grants equal seniority credit to male and female employees for all time actually worked when such a system is challenged by a female employee who failed to accumulate seniority during layoffs that occurred prior to the effective date of the Act?

2. Whether unearned remedial seniority can be granted to a female employee under Title VII to eliminate the effects of seniority not accrued during pre-1965 layoffs made under separate male and female seniority rosters even though maintaining such seniority rosters was not illegal at that time?

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Act of 1972 (P.L. 92-261), 42 U.S.C. § 2000e, *et seq.* (hereinafter the "Act" or "Title VII"), specifically Sections 703(a), (h) and (j), 42 U.S.C. § 2000e-2(a), (h) and (j). These Sections are set forth in their entirety at Appendix F attached hereto. In relevant part, however, Section 703(h) of the Act provides:

> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

This action is based on alleged discrimination because of sex. It is an individual action brought by Winifred S. Nance (hereinafter "Nance"), a Union Carbide employee, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, to enjoin, *inter alia,* the further use of Union Carbide's company service seniority system at its Charlotte, North Carolina plant. Nance also sought remedial seniority and back pay relief for time spent on layoff. The district court's jurisdiction was based on Section 706(f) of the Act, 42 U.S.C. § 2000e-5(f).

I.

Background

At all times relevant to this case, the Charlotte plant of Union Carbide has been primarily engaged in the manufacture of dry cell batteries for military use. This dependence on the military's demand for batteries has resulted in large fluctuations in employment over the years. Thus, the Charlotte plant has a long history of frequent layoffs and recalls.

The seniority system used at the Charlotte plant is based on "company service credit." Company service credit is synonymous with the terms "company seniority" or "plant-wide seniority" as those terms are used in many industries.[1] It is defined as accrued time on the active payroll of Union Carbide, whatever the job or department.

1. *See, Jersey Central Power & Light Co.* v. *Electrical Workers, Local 327,* 508 F.2d 687, 696, n.22 (3d Cir. 1975), *vacated and remanded,* ..... U.S. ....., 96 S. Ct. 2196 (1976). *Cf.* Cooper & Sobol, *Seniority & Testing Under Fair Employment Laws: A General Approach to Objective Criteria for Hiring & Promotion,* 82 Harv. L. Rev. 1598, 1601 (1969).

Like most seniority systems, nonproductive time such as time spent on layoff and certain other breaks in active employment is not counted in computing an employee's company service credit.[2] Job offers, job transfers, layoffs and recalls are all based on an employee's company service date. Job seniority or department seniority is not used at the Charlotte plant.

The Charlotte plant began operations in 1943. At all times since the plant opened, females have comprised a majority of the work force except for the period from 1960 to 1970 when about 40-45% of the work force was females. Prior to the effective date of Title VII (July 2, 1965), however, jobs were classified as male jobs or female jobs according to factors such as weight-lifting requirements, state statutory restrictions on the hours of work for females and other hardship factors. During this pre-Act period, Union Carbide also maintained separate seniority rosters for male and female employees. Male employees were laid off from male jobs according to their company service standing on the male seniority roster while females were laid off from female jobs on the basis of their company service standing relative to other females.

On June 22, 1965, prior to the effective date of Title VII, the separate male and female seniority rosters were merged into one consolidated seniority list and all jobs at the Charlotte plant were reclassified as "male" or

2. Many seniority systems do not permit seniority to accumulate during layoffs. A 1972 study by the Department of Labor, Bureau of Labor Statistics, showed that 81% of the 364 collective bargaining agreements surveyed do not permit the accumulation of seniority during layoffs which exceed a specified period of time. Department of Labor, Bureau of Labor Statistics, *Layoffs, Recall and Work Sharing Procedures,* Bulletin 1425-13 at 49-52 (1972). At Union Carbide, the policy of excluding nonproductive time spent on layoff in computing an employee's company service date provides an incentive to experienced employees to accept jobs that must be filled during reduced levels of production.

"either" jobs. This change effectively expanded the number of jobs available to both sexes. All jobs that remained classified as male jobs required hours of work exceeding those permitted by statute in North Carolina[3] or required a physical exerted force in excess of 25 pounds in violation of protective laws in other states.[4] On August 19, 1969, the Equal Employment Opportunity Commission (hereinafter "EEOC") published a new set of guidelines on sex discrimination. Contrary to previous EEOC guidelines which provided that Title VII did not disturb state laws designed to protect female employees, the new guidelines provided that such laws were now deemed to conflict with Title VII and would no longer be considered a valid defense to employment practices that discriminated against females.[5] In September 1969, the Seventh Circuit Court of Appeals, in a case of first impression in the courts, held that an

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3. Prior to its amendment in 1973, North Carolina General Statute § 95.17 provided that: "No employer shall employ a female person for more than forty-eight hours in any one week or nine hours in any one day, or on more than six days in any period of seven consecutive days."

4. The decision to classify jobs that required an exerted force of more than 25 pounds as male jobs was made by the Consumer Products Division of Union Carbide based on the desire to maintain uniform job classifications in its multi-state operations. The Charlotte plant is a part of the Consumer Products Division which is headquartered in Ohio. Between 1965 and 1969 Ohio had a statute that prohibited the employment of females in occupations that required "frequent or repeated lifting of weights over twenty-five pounds." Ohio Rev. Code § 4107.43. This 25 pound limitation was considered to be representative of the state protective laws in the jurisdictions where Consumer Products Division plants were located.

5. *Compare EEOC Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.1(b) and (c), 30 Fed. Reg. 14,926 (Dec. 2, 1965), *with EEOC Guidelines on Discrimination Because of Sex*, 29 C.F.R. 1604.1(b) and (d), 34 Fed. Reg. 13,367 (Aug. 19, 1969). *Cf. Gilbert* v. *General Electric Co.*, ... U.S. ....., Nos. 74-1589 and 74-1590 (Dec. 7, 1976) (EEOC guidelines that flatly contradict earlier guidelines which were issued closer to the date of enactment of the controlling statute are not entitled to the weight of non-conflicting guidelines).

employer must give females the opportunity to demonstrate their ability to perform jobs that required lifting more than 35 pounds. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).[6]

Union Carbide voluntarily responded to the *Bowe* decision and the new EEOC guidelines by dropping its policy of classifying jobs as "male" or "either" jobs and initiated a new policy of classifying jobs as "light" or "heavy". Jobs that required an exerted force in excess of 30 pounds were classified as heavy jobs. All other jobs were classified as light jobs. This new policy was announced to employees on November 18, 1969. Thereafter, *all* jobs at the Charlotte plant were available to male and female employees on the same basis. Females could bid on any light or heavy job in the plant and were laid off and recalled to these jobs on the basis of their company service seniority standing with respect to other male and female employees.[7] This job classification system, which was upheld by the Fourth Circuit in this case, remains in effect today at the Charlotte plant.

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6. During this time other courts began striking down state protective laws for females. *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Ridinger* v. *General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971); *Kober* v. *Westinghouse Electric Corp.*, 325 F. Supp. 467 (W.D. Pa. 1971), *aff'd*, 480 F.2d 240 (3d Cir. 1973); *Garneau* v. *Raytheon Co.*, 323 F. Supp. 391 (D. Mass. 1971); *Local 246, Utility Workers* v. *So. California Edison Co.*, 320 F. Supp. 1262 (C.D. Cal. 1970); *Caterpillar Tractor Co.* v. *Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970); *Richard* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969).

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7. The Fourth Circuit noted Union Carbide's good faith efforts to comply with Title VII as follows: "The evidence clearly reveals [that] the defendant has been attentive to any changes in either the regulations or the construction of the law and alert to conform its practices to such changes." 540 F.2d at 726.

II.

Application of Union Carbide's Employment Practices to Nance

Nance was hired by Union Carbide on July 8, 1952. On July 2, 1965, the effective date of Title VII, Nance had a company service seniority date of September 25, 1955. The difference between her date of hire and her company service date resulted from five layoffs which occurred prior to 1965.[8] From July 2, 1965 to November 18, 1969 (the time during which jobs were classified as "male" or "either") there were no work curtailments and thus Nance was not involved in a layoff and did not lose any company service seniority.

On January 23, 1970, Nance was laid off for the first time since the effective date of Title VII along with other employees in a general production cutback. At this time, all jobs were equally available to males and females. Prior to being laid off, Nance was rightfully displaced from her job by a more senior female employee. Nevertheless, Nance had enough seniority to remain in the plant. In accordance with her company service seniority, she was of-

8. Prior to the effective date of Title VII, Nance's company service date was adjusted due to layoffs caused by work curtailments as follows:

Hired 7-8-52	Original company service date of 7-8-52
Laid off 12-13-53 Rehired 5-2-55	Adjusted CS 11-14-53
Laid off 7-15-55 Rehired 9-28-55	Adjusted CS 1-25-54
Laid off 2-24-61 Rehired 8-21-61	Adjusted CS 7-21-54
Laid off 9-28-62 Rehired 2-11-63	Adjusted CS 12-3-54
Laid off 4-3-64 Rehired 1-25-65	Adjusted CS 9-25-55

fered 25 jobs that were held by junior employees. She refused all 25 jobs and *voluntarily* elected layoff, thereby allowing less senior employees to remain in the plant and accrue company service. Moreover, on two separate occasions while on layoff, Nance turned down recall to a total of 10 jobs electing instead to remain on layoff. On July 20, 1970, Nance finally accepted a job offer and was recalled from layoff. As a result of the 1970 layoff, Nance's company service date was adjusted from September 25, 1955 to March 20, 1956.

On February 7, 1972, Nance was involved in a production cutback and layoff. She was again initially displaced from her job as before but avoided layoff by accepting one of the jobs offered her.

On April 18, 1973, Nance was again laid off. Like the 1970 layoff, Nance was offered approximately 16 jobs in accordance with her plant-wide seniority standing which she refused. If she had accepted one of these jobs, as she had done in the 1972 cutback, she would have thus remained on the active payroll and continued to accrue company service. Nance remained on layoff until she was recalled on August 20, 1973. She returned to work with an adjusted company service seniority date of July 21, 1956.

This action was brought by Nance on August 18, 1972.[9] In the part of her complaint that is relevant to this petition, Nance claimed that her 1970 layoff was caused by seniority she had been unable to accumulate because of layoffs that occurred prior to 1965. In support of her claim, Nance pointed to several male employees who had moved ahead of her on the seniority list because they had not been laid off

9. This is an individual action. It was admittedly not brought or maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

prior to 1965. On the basis of these facts, the district court found that Union Carbide's seniority system perpetuated the effects of pre-Act discrimination against females in violation of Title VII. The court broadly enjoined the further use of company service credit for job placement purposes and, in an individual action, ordered Union Carbide to substitute a "date of hire seniority system" not only for Nance but for *all* employees at the Charlotte plant.

Union Carbide appealed the district court's decision to the Fourth Circuit Court of Appeals which vacated the class action relief ordered by the district court. On the issue of Union Carbide's seniority system, the Fourth Circuit held as follows:

> It is conceded by the defendant that in the pre-Act period, the jobs in certain departments were reserved exclusively for male employees and that in periods of layoff only qualified male employees could bid on the jobs in these departments. Such a system obviously gave the male employee a preferred opportunity to protect his 'company service' over the female employee. This more extensive opportunity in bidding for vacancies during layoffs on the part of male employees was a discrimination against female employees, and because that discrimination was carried over in the operation of the post-Act seniority system it tainted such post-Act system. To such extent as the plaintiff was prejudiced thereby in the computation of her 'company service' or seniority rights, she is entitled to relief. This the District Court correctly concluded.
>
> The plaintiff is accordingly entitled to a judgment requiring an adjustment in her 'company service' status sufficient to remove the adverse effect of any pre-Act discriminatory layoffs (footnotes omitted). 540 F.2d at 729.

REASONS THAT THE WRIT SHOULD BE GRANTED

The decision of the Fourth Circuit Court of Appeals in this case creates a direct conflict with the Seventh Circuit's holding in *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, ... U.S. ....., 96 S. Ct. 2214 (1976).[10] In addition, the Fourth Circuit's decision conflicts with this Court's interpretation of Section 703(h) of the Act in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). Finally, this case presents the following important questions of federal law which have not been, but should be, settled by this Court: (1) the validity of a company service seniority system which is admittedly neutral on its face but which purportedly disadvantages females because it excludes seniority credit for time lost due to layoffs that occurred prior to the effective date of Title VII; and (2) whether remedial seniority may now be granted to erase the effects of lawful pre-Act layoffs. For these reasons, the writ should be granted.

I.

The Conflict Between Circuits

The decision of the Fourth Circuit Court of Appeals in this case directly conflicts with the decision of the Court of Appeals for the Seventh Circuit in *Waters* v. *Wisconsin*

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10. The Fourth Circuit's decision in this case also conflicts with the decision of the Third Circuit in *Jersey Central Power & Light Co.* v. *Electrical Workers, Local 327*, 508 F.2d 687 (3d Cir. 1975), *vacated and remanded*, ... U.S. ....., 96 S. Ct. 2196 (1976). However, this Court vacated and remanded this decision in light of *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), apparently because there was evidence of *post-Act* discrimination. In addition, it is arguable that the Fourth Circuit's decision in this case also conflicts with decisions of the Fifth Circuit. *See Watkins* v. *Steelworkers Local 2369*, 516 F.2d 41 (5th Cir. 1975); *Papermakers Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

Steel Works, supra. *Waters* involved a Title VII action by two black bricklayers against an employer and a local union.[11] The plaintiffs contended that the company's "last hired—first fired" company seniority system perpetuated the effects of pre-Act hiring discrimination. This holding was based on evidence which showed that the company did not hire its first black bricklayer until 1964 even though blacks had inquired about bricklayer jobs as early as 1947. One of the plaintiffs in *Waters* first inquired about employment with Wisconsin Steel as a bricklayer in 1957 but was not hired until July, 1964. Two months after being hired, the plaintiff was laid off and was not recalled until March 1967. In May 1967, the plaintiff was once again laid off. Both the 1964 and 1967 layoffs were based on the plaintiff's seniority standing.

The seniority system involved in *Waters* closely resembles the company service seniority system in this case. There, the seniority system gave full credit to all bricklayers for their actual length of service with the company. Seniority vested after a 90-day probationary period but could be broken by various events including layoffs in excess of two years. On these facts, the district court held "The seniority system . . . had its genesis in a period of racial discrimination and is thus . . . not a bona fide seniority system under Title VII." *Waters* v. *Wisconsin Steel Works,* 502 F.2d at 1314. The district court concluded that the defendants violated the Act by laying off the plaintiff in 1967.

On appeal, the Seventh Circuit reversed. The court agreed that there had been pre-Act discrimination but held that the seniority system was a bona fide system based on its interpretation of the legislative history of Title VII:

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11. Employees at Union Carbide's Charlotte plant are not represented by a labor organization.

> We are of the view that Wisconsin Steel's employment seniority system embodying the 'last hired, first fired' principle of seniority is not of itself racially discriminatory or [sic] does it have the effect of perpetuating prior racial discrimination in violation of the strictures of Title VII. To that end we find the legislative history of Title VII supportive of the claim that an employment seniority system is a 'bona fide' seniority system under the Act. 502 F.2d at 1318.

Contrary to the Seventh Circuit's decision in *Waters,* the Fourth Circuit in this case stated that "*Any seniority system that carried over into the post-Act period the effects of a pre-Act discriminatory job assignment policy disadvantaging a black [or female] in seniority rights [is] not a bona fide seniority system under the Act*" (emphasis added). 540 F.2d at 729. On the basis of this reasoning, the Fourth Circuit ordered "an adjustment in [Nance's] company service status sufficient to remove the adverse effect of any *pre-Act* discriminatory layoffs" (emphasis added). 540 F.2d at 729. Thus, the Seventh Circuit's holding in *Waters* that an employment seniority system which arguably perpetuates pre-Act discrimination is still a bona fide system under Section 703(h) of the Act is in direct conflict with the Fourth Circuit's decision in this case that *any* seniority system which perpetuates pre-Act discrimination violates Title VII.

II.

The Fourth Circuit's Decision Conflicts With This Court's Decision in Franks v. Bowman Transportation Co.

In *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976), this Court considered the question of "whether identifiable applicants who were denied employment be-

cause of race *after the effective date of Title VII* . . . may be awarded seniority status retroactive to the dates of their employment applications" (emphasis added). 424 U.S. at 750. The Fifth Circuit in *Bowman* had held that Section 703(h) of the Act, 42 U.S.C. § 2000e-2(h), barred an award of remedial seniority. Section 703(h) provides that:

> Notwithstanding any other provision of this title it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

This Court disagreed with the Fifth Circuit's interpretation of Section 703(h) noting that this Section appears to be a definitional provision that delineates those employment practices that are illegal and those that are not. "Section 703(h) certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII . . . in circumstances where an illegal discriminatory act or practice is found." 424 U.S. at 758. The Court was careful to point out, however, that the underlying legal wrong in *Bowman* was a *post-Act* refusal to hire rather than the functioning of a racially neutral seniority system. In this context, the Court held that seniority relief may be granted to identifiable victims of illegal post-Act hiring discrimination.

Although the holding in *Bowman* does not address the question presented here of the legality of a seniority system which allegedly perpetuates the effects of *pre-Act* losses of seniority, the Court clearly indicated that Section 703(h) of the Act would protect such a system. In this regard, the Court stated:

> [I]t is apparent that the thrust [of Section 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the *post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act* (emphasis added). 424 U.S. at 761.

Likewise, Mr. Justice Powell in his concurring opinion, with whom Mr. Justice Rehnquist joined, stated:

> I also agree with Part II of the opinion insofar as it determines *the 'thrust' of § 703(h) of Title VII to be the insulation of an otherwise bona fide seniority system from a challenge that it amounts to a discriminatory practice because it perpetuates the effects of pre-Act discrimination* (emphasis added). 424 U.S. at 781.

Contrary to the interpretation of Section 703(h) in *Bowman*, the Fourth Circuit held that Union Carbide's company service seniority system violated Title VII solely because the system perpetuated pre-Act discrimination. In other words, the Fourth Circuit's decision in this case would require that any pre-Act discrimination which resulted in a loss of seniority, no matter how lawful it may have been at the time or no matter how long ago it occurred, must be corrected by a restoration of seniority in order for the seniority system to be a bona fide system within the meaning of the Act. In reaching this conclusion, the Fourth Circuit in this case adopted the rationale of the District Court for the Eastern District of Virginia in *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). The Fourth Circuit in its decision in this case stated:

> The defendant does not dispute the method of calculating 'company service' as claimed by the plaintiff. It

does suggest that all of the plaintiff's layoffs prior to January, 1970, took place before July 2, 1965, the effective date of Title VII and that such layoffs, whether discriminatory or not, were not illegal at the time. *It does not follow, however, that, though they occurred before the effective date of the Act, these layoffs may not result in a violation of the Act if they have an adverse effect on the employee's seniority rights after the Act became effective.* The bellwether authority in this area is the oftcited case of *Quarles* v. *Philip Morris, Inc.*, (E.D. Va. 1968) 279 F. Supp. 505, 517-8. That case held (a) that only a *bona fide* seniority system was protected under the Act, (b) that 'one characteristic of a *bona fide* seniority system must be lack of discrimination,' and (c) that a seniority system however neutral facially, is not a *bona fide* seniority system if it 'has its genesis in racial [or sex] discrimination,' whether pre-Act or post-Act (emphasis added). 540 F.2d at 728-729

The Fourth Circuit's reliance on *Quarles* is clearly misplaced. Unlike Union Carbide's company service seniority system, *Quarles* involved the post-Act effects of both a departmental seniority system and a restrictive transfer policy which combined to "lock" black employees into pre-Act patterns of discrimination.[12] The operation of this type of system is illustrated by the plaintiff's treat-

12. In addition to *Quarles*, the Fourth Circuit relies on numerous other departmental seniority cases to support its holding that *any* seniority system that perpetuates pre-Act discrimination violates Title VII. However, the Fourth Circuit completely disregarded those cases that have upheld a company service seniority system which perpetuates pre-Act discrimination. *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, ... U.S. ....., 96 S. Ct. 2214 (1976); *Jersey Central Power & Light Co.* v. *Electrical Workers, Local 327*, 508 F.2d 687 (3d Cir. 1975), *vacated and remanded* ..... U.S. ....., 96 S. Ct. 2196 (1976). *Cf. Watkins* v. *Steelworkers, Local 2369*, 516 F.2d 41 (5th Cir. 1975).

ment in *Quarles*. There, the company had a pre-Act policy of restricting blacks to certain departments where lower paying jobs were located. In 1964 and 1965, the plaintiff sought a transfer from the prefabrication department, where approximately 92% of the employees were black, to a higher paying job in the warehouse department which was 88% white. This request was denied because transfers between these departments were prohibited by the collective bargaining agreement. In 1966, the collective bargaining agreement was modified to allow transfers between the prefabrication department and the warehouse department. However, transferees were required to give up the seniority they had accumulated in their old department. Their seniority date in the new department was computed from the date of transfer. An employee's departmental seniority, thus computed, was used to compete for available jobs during layoffs and for transfers, promotions and shift assignments. With these rules in effect, the plaintiff in *Quarles* was offered a transfer to a better paying job in the warehouse department but declined because he did not wish to relinquish the seniority he had accumulated in the prefabrication department.

On the basis of these facts, the district court held in *Quarles* that the departmental seniority system and restrictive transfer policy perpetuated pre-Act discrimination. The court rejected the company's contention that its seniority system was protected by Section 703(h) of the Act. After considering the legislative history of Section 703(h), the court concluded:

> Several facts are evident from the legislative history. First, it contains no express statement about departmental seniority. Nearly all of the references are clearly to employment seniority. None of the excerpts upon which the company and the union rely suggests

> that as a result of past discrimination a Negro is to have employment opportunities inferior to those of a white person who has less employment seniority . . . . It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act. 279 F. Supp. at 516.

Thus, it was not the departmental seniority system alone that the court in *Quarles* condemned. Rather, it was the restrictive transfer policy that had the illegal effect of "freezing" black employees into lower paying jobs. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court stated that "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 430. Here, unlike *Quarles* and *Griggs*, female employees are not locked or frozen into lower paying jobs.

Union Carbide employees, both male and female alike, may transfer to any job in the plant based on their company service seniority standing. Employees who transfer to different departments use their accumulated company service in their new department for all competitive job bidding purposes. Unlike the departmental seniority cases relied on by the Fourth Circuit, an employee suffers no loss of seniority or other detriment because of interdepartmental transfers. Thus, in the 1970 layoff, upon which this action is based, Nance refused offers to transfer to any one of 25 jobs in various departments in lieu of layoff. Most of the jobs that were offered to her were "heavy" jobs that had formerly been reserved for male employees. Her choice not to transfer to these jobs was not impeded by a restrictive transfer policy like the policy condemned in *Quarles*.

There is another crucial distinction between company service seniority and departmental seniority that was overlooked by the Fourth Circuit. By limiting an individual's seniority standing to time worked in a particular department, a departmental seniority system freezes blacks and females into pre-Act patterns of discrimination vis-a-vis white or male employees who have equal or less actual working time for an employer. Therefore, the seniority expectations of whites and males in the departmental seniority cases are unearned. Under company service seniority systems, on the other hand, all seniority expectations are earned since employees compete on the basis of seniority accrued by actually working for a company. Thus, the restoration of seniority for time lost due to pre-Act layoffs in this case would result in preferential treatment rather than remedial treatment since Nance would be given seniority for time not actually worked. Such preferential treatment is expressly prohibited by Section 703(j) of the Act, 42 U.S.C. § 2000e-2(j).

Finally, the legislative history of Section 703(h), discussed by this Court in *Bowman*, clearly supports the distinction between a company service seniority system and a departmental system. Likewise, the legislative history requires the conclusion that Section 703(h) protects company service seniority rights that vested prior to the effective date of Title VII.[13] This point was recognized by this Court in *Bowman* when it was stated that Section 703(h) insulates an otherwise bona fide seniority system from claims that it perpetuates pre-Act discrimination. Thus, the writ should be granted to correct the obvious conflict between the Fourth Circuit holding in this case and the Court's reasoning in *Bowman*.

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13. *See Waters* v. *Wisconsin Steel Works*, 502 F.2d at 1318-19, for a thorough discussion of the legislative history of Title VII as it relates to company service type seniority systems.

III.

This Case Presents an Important Question of Federal Law Which Has Not, but Should Be, Settled by This Court

Can a company service seniority system which grants equal credit to all male and female employees for all time actually worked be challenged on the basis that the system perpetuates the effects of seniority losses caused by layoffs that occurred prior to the effective date of Title VII? In essence, this is the question that is presented by this case that has not been, but should be, settled by this Court.

In *Franks* v. *Bowman Transportation Co.*, 424 U.S. at 766, the importance of seniority to employees and business in general was recognized by this Court. "Seniority systems and the entitlements conferred by credits thereunder are of vast and increasing importance in the economic employment system of this nation." Likewise, in *Humphrey* v. *Moore*, 375 U.S. 335, 346-347 (1964), the Court stated that "Seniority has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job."

Despite the importance of seniority, the lower courts have been unable to provide employers and labor organizations with any definitive guidelines concerning what is and what is not a bona fide seniority system under Section 703(h) of the Act. This fact is amply demonstrated by a review of Title VII cases involving seniority systems.

There are four basic types of seniority that have been the subject of judicial scrutiny under the Act: departmental seniority, unit seniority, job seniority and company or plant-wide seniority. The courts have uniformly held that departmental seniority systems violate Title VII when

combined with a history of pre-Act discrimination in job assignments and a restrictive transfer policy.[14] The same is true for unit seniority[15] and job seniority systems.[16] It is also clear that a company or plant-wide seniority system violates Title VII if it perpetuates *post-Act* discrimination in hiring.[17] What has not been settled by this Court or the circuit courts is the validity of a company seniority system which perpetuates the effects of *pre-Act* losses of seniority.

As discussed above, there is a conflict in the two circuits that have considered this precise question. The Seventh Circuit has held that a company seniority system which "continues the effect of past employment discrimination" is nevertheless a bona fide system within the meaning of Section 703(h) of the Act. *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974). In the instant case, the Fourth Circuit has held that Union Carbide's

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14. *Rice* v. *Gates Rubber Co.*, 521 F.2d 782 (6th Cir. 1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Heard* v. *Mueller Co.*, 464 F.2d 190 (6th Cir. 1972); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971).

15. *United States* v. *Navajo Freight Systems*, 525 F.2d 1318 (9th Cir. 1975); *Bing* v. *Railway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973); *United States* v. *Chesapeake & Ohio Ry. Co.*, 471 F.2d 582 (4th Cir. 1972); *United States* v. *St. Louis-San Francisco Ry. Co.*, 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 116 (1973); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971).

16. *Carey* v. *Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974); *United States* v. *Hayes International Corp.*, 456 F.2d 112 (5th Cir. 1972); *Long* v. *Georgia Kraft Co.*, 450 F.2d 557 (5th Cir. 1971); *Papermakers, Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

17. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *Acha* v. *Beame*, 531 F.2d 648 (2d Cir. 1976); *Evans* v. *United Air Lines, Inc.*, 534 F.2d 1247 (7th Cir. 1976), *cert. granted*, ... U.S. ..... (1976).

company service system is not protected by Section 703(h) because it perpetuates pre-Act losses of seniority.

Only two other circuit courts have considered the validity of a company seniority system in the layoff context. Neither decision provides a definitive answer to the question presented by this case. In *Jersey Central Power & Light Co.* v. *Electrical Workers, Local 327*, 508 F.2d 687 (3d Cir. 1975), the court, in a declaratory judgment action, concluded that a company seniority system was a bona fide system within the meaning of Section 703(h). The court stated:

> We believe that Congress intended a plant-wide seniority system, facially neutral but having a disproportionate impact on female and minority group workers, to be a bona fide seniority system within the meaning of § 703(h) of the Act.
>
> To effectuate this intent, the only evidence probative in a challenge to a plant-wide seniority system would be evidence directed to its bona fide character; that is, evidence directed either to the neutrality of the seniority system or evidence directed to ascertaining an intent or design to disguise discrimination. As such, it is not fatal that the seniority system continues the effect of past employment discrimination. We believe this result was recognized and left undisturbed by Congress in its enactment of § 703(h) and (j). 508 F.2d at 706-707.

Apparently, however, because there was some evidence of *post-Act* discrimination in hiring minorities and females, the decision of the Third Circuit was vacated and remanded by this Court for reconsideration in light of *Franks* v. *Bowman Trucking Company, supra.*

The other circuit to consider the validity of a company seniority question does not support the Fourth Circuit's decision in this case and provides no definite resolution of the issue presented here. In *Watkins* v. *Steelworkers, Local 2369*, 516 F.2d 41 (5th Cir. 1975), the company had a *pre-Act* history of discrimination in the hiring of blacks. Nevertheless, the Fifth Circuit upheld the validity of a company service system that resulted in the layoff of a disproportionate number of blacks where the black employees who were laid off were not actually affected by the pre-Act discrimination. The Fifth Circuit stated its holding as follows:

> We hold that, regardless of an earlier history of employment discrimination, when present hiring practices are nondiscriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid-off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII or §1981, even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination. 516 F.2d at 44-45.

Thus, the Fifth Circuit's decision in *Watkins* appears to introduce a new factor for courts to consider when confronted with the question of whether a company service seniority system may be challenged because it perpetuates pre-Act discrimination. That is, whether the victims of the post-Act operation of the seniority system must prove that they suffered pre-Act discrimination. This issue was specifically reserved by the *Watkins* court for future consideration:

> We specifically do not decide the rights of a laid-off employee who could show that, but for the discriminatory refusal to hire him at an earlier time than the date of his actual employment, or but for his failure to obtain earlier employment because of exclusion of minority employees from the work force, he would have sufficient seniority to insulate him against layoff. 516 F.2d at 45.

However, the fact that it can be demonstrated that a particular individual actually suffered pre-Act discrimination should not be a consideration in determining whether Section 703(h) protects a company service seniority system from claims that it perpetuates pre-Act discrimination. To hold otherwise would produce the anomalous results of placing a company which hired substantial numbers of females or minorities prior to 1965 in a worse position than a company that refused to hire females or minorities during this period.

In addition to confusion created by the circuit courts concerning the validity of a company service seniority system under Section 703(h) of the Act, there is another important reason why this question should be decided by this Court. If the decision of the Fourth Circuit in this case is allowed to stand, it would render the protection afforded by Section 703(h) a nullity and would pave the way for an endless stream of litigation based on pre-1965 acts. For example, an individual who was not hired by an employer in 1950 because of race or sex but was later hired in 1951 would arguably have a continuing claim of discrimination against the employer as long as he

worked.[18] In 1977, this individual could bring suit under Title VII because a white (or male) employee with six months greater seniority received a particular promotion, transfer or more desirable shift assignment. Upon retirement, the individual could claim his retirement benefits are diminished due to the discriminatory refusal to hire years earlier. This constant exposure to litigation for pre-Act discrimination is obviously what Congress intended to avoid when it provided in Section 703(h) that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system." This point was recognized in *Franks* v. *Bowman Transportation Co.*, *supra*, when this Court interpreted Section 703(h) as protecting an otherwise bona fide seniority system from claims that it perpetuates pre-Act discrimination. For these reasons, the important issues presented by this case should be settled by this Court.

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18. This Court has issued a writ of certiorari to review the question of the timeliness of a charge which alleges that a company service seniority system perpetuates the effects of a *post-Act* loss of seniority. *Evans* v. *United Air Lines, Inc.*, 534 F.2d 1247 (7th Cir. 1976), *cert. granted*, ... U.S. ..... (1976). However, since *Evans* involves the perpetuation of post-Act discrimination, this Court's decision in that case will not be dispositive of the issues presented here (i.e., the timeliness of charges alleging the perpetuation of *pre*-Act discrimination, and whether Section 703(h) protects a company service seniority system which perpetuates *pre-Act* discrimination). A writ of certiorari should, therefore, issue in this case to provide a complete answer to the questions only partially raised in *Evans*.

CONCLUSION

Wherefore, for the reasons set forth above, the Petitioner respectfully prays that a writ of certiorari be issued to resolve a conflict between the circuits and a conflict between the decision in this case and the decision of this Court in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). Further, a writ should issue to settle significant, but unresolved issues, under Title VII of the Civil Rights Act.

Respectfully submitted,

THOMPSON, OGLETREE AND DEAKINS
By: J. FRANK OGLETREE, JR.
By: H. LANE DENNARD, JR.
By: STUART M. VAUGHAN, JR.

APPENDIX

APPENDIX A

(Filed April 28, 1975)

Winifred S. NANCE, Plaintiff,

v.

UNION CARBIDE CORPORATION, CONSUMER PRODUCTS DIVISION, a corporation, Defendant.

No. C-C-72-185.

United States District Court, W. D. North Carolina, Charlotte Division.

April 28, 1975.

Female employee filed suit against her employer alleging that she was subjected to discrimination because of her sex in matters of employment, classification, promotion and other incidents of employment. The District Court, McMillan, J., held, inter alia, that the employer had engaged in an unlawful employment practice under Title VII of the Civil Rights Act of 1964 in adopting a job application procedure which distinguished between "light" and "heavy" jobs where the procedure operated as a disguised form of classification by sex and created unreasonable obstacles to the advancement by females into jobs which females could reasonably be expected to perform.

Judgment for plaintiffs.

1. Civil Rights (Key) 46

Relevant time period for determining employer's liability for alleged sex discrimination in employment and

employee's entitlement to relief is at and before suit is filed; while employer's more recent practices may have bearing on question of relief, they do not affect determination of whether employer previously violated Title VII of Civil Rights Act of 1964. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

2. Civil Rights (Key) 44(1)

Statistics carry much weight in cases brought under Title VII of Civil Rights Act of 1964. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

3. Civil Rights (Key) 44(5)

Prima facie showing that employer had discriminated against its female employees because of sex was made by statistics which reflected that overwhelming majority of females in employer's plant were employed in only four of 16 departments. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

4. Civil Rights (Key) 44(5)

Prima facie case of sex discrimination in employment established by statistics was confirmed by evidence that employer, inter alia, established categories designated "male" or "either" for certain jobs not considering females under any circumstances for those jobs designated as male jobs; established 25-pound weight limitation, effect of which was to continue prior male and female job classifications; and adopted policy of designating jobs as either "heavy" or "light" which had effect of distinguishing jobs as either male or female. Civil Rights Act of 1964, § 703(a) as amended 42 U.S.C.A. § 2000e-2(a); Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note; G.S.N.C. § 95-17; R.C. Ohio § 4107.43.

5. Civil Rights (Key) 9.13

Under employment discrimination provision of Civil Rights Act of 1964, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" status quo of prior discriminatory practice. Civil Rights Act of 1964, § 703(a) as amended 42 U.S.C.A. § 2000e-2(a).

6. Civil Rights (Key) 9.14

Where employer had in past operated sexually segregated system of employment in which assignments to particular job classifications and departments were restricted on basis of sex, continued reliance on seniority system which gave male employees competitive advantage over female employees in terms of promotions, transfers, layoffs and recalls was illegal under employment discrimination provisions of Civil Rights Act of 1964. Civil Rights Act of 1964, § 703(a)(2) as amended 42 U.S.C.A. § 2000e-2(a)(2).

7. Civil Rights (Key) 9.14

Where employer had in past operated sexually segregated system of employment in which assignments to, layoff from, and recall to, job classifications were done on basis of sex, adoption of job allocation procedure which distinguished between "light" and "heavy" jobs constituted unlawful employment practice where it operated as disguised form of classification by sex and created unreasonable obstacles to advancement by females into jobs which females would reasonably be expected to perform. Civil Rights Act of 1964, § 703(a)(2) as amended 42 U.S.C.A. § 2000e-2(a)(2).

8. Civil Rights (Key) 9.14

Where employer had historically classified its employees on basis of sex, it was impermissible for employer to rely on word-of-mouth notices of job vacancies. Civil Rights Act of 1964, § 703(a)(2) as amended 42 U.S.C.A. § 2000e-2(a)(2).

9. Civil Rghts (Key) 39

Under employment discrimination provisions of Civil Rights Act of 1964, reliance on state laws cannot justify discriminatory practices where such laws conflict with federal laws. Civil Rights Act of 1964 § 708 as amended 42 U.S.C.A. § 2000e-7.

10. Civil Rights (Key) 9.14

Only if challenged sexually discriminatory employment practice is found to be essential to overriding legitimate, nonbusiness purpose, such as safety and efficiency, can practice be allowed to stand. Civil Rights Act of 1964, § 703(a)(2) as amended 42 U.S.C.A. § 2000e-2(a)(2).

11. Civil Rights (Key) 44(5)

In order to rely on bona fide occupation qualification exception set forth in employment discrimination provisions of Civil Rights Act of 1964 with respect to its weight-lifting policy, employer had burden of proving by preponderance of evidence that all or substantially all females would be unable to perform safely and efficiently the duties of the jobs involved; employer did not meet such burden. Civil Rights Act of 1964, § 703(e) as amended 42 U.S.C.A. § 2000e-2(e).

12. Civil Rights (Key) 46

Where employer has engaged in pervasive practice of discrimination on account of sex, affirmative and mandatory relief is required in order to insure full enjoyment of right to equal employment opportunities. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

13. Civil Rights (Key) 46

In ordering relief from sexual discrimination in employment under Civil Rights Act of 1964, court should not parrot Act, but should order affirmative relief which is appropriate to insure full enjoyment of employment rights. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

14. Civil Rights (Key) 46

Measures ordered by court to remedy sexually discriminatory practices of employer included modification of reliance on company service seniority and departmental preference in employer's vacancy-filling procedure; institution of seniority system based on revised seniority date for purposes of promotions, departmental transfers, layoffs and recalls; posting of notice of vacancies and revised seniority standing of employees; offering of vacancies on basis of revised dates of seniority; injunction against requiring plaintiff to pass test not required of her male counterparts; and discontinuance of employer's weight-lifting limitation policy. Civil Rights Act of 1964, § 703(a)(2) as amended 42 U.S.C.A. § 2000e-2(a)(2).

15. Civil Rights (Key) 46

Where employment discrimination has been clearly demonstrated, employees who have been victims of that discrimination must be compensated if economic loss can be established. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

16. Civil Rights (Key) 44(5)

In action under Civil Rights Act of 1964 for sexual discrimination in employment, statistics showing foreman and supervisory work force by sex and employer's reliance on subjective criteria for selection of its supervisory work force demonstrated that employer had discriminated against its female employees in selection of its supervisory personnel. Civil Rights Act of 1964, § 703(a)(2) as amended 42 U.S.C.A. § 2000e-2(a)(2).

17. Civil Rights (Key) 46

Successful plaintiff in action brought under Civil Rights Act of 1964 to recover for unlawful sexual discrimination in employment was entitled to recover her costs and reasonable attorney's fees as part of her costs. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

Robert Belton and Jonathan P. Wallas, Charlotte, N. C. (Chambers, Stein & Ferguson, Charlotte, N. C.), for plaintiff.

J. Frank Ogletree, Jr., H. Lane Dennard, Jr., and Guy F. Driver, Jr., Greenville, S. C. (Thompson, Ogletree & Deakins, Greenville, S. C.), for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

McMILLAN, District Judge.

Winifred S. Nance, the plaintiff, a white female, filed this suit on August 18, 1972, against Union Carbide Corporation of Charlotte, North Carolina, alleging that she was subjected to discrimination because of her sex in the matter of employment, classification, promotion and other incidents of employment. The complaint alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. This matter came on for a hearing in March, 1974 and December, 1974 and the Court, after consideration of the evidence, enters Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiff, Winifred S. Nance, is a female citizen of the United States and the State of North Carolina, residing in Charlotte, Mecklenburg County, North Carolina. The plaintiff has been employed by the defendant at its Charlotte plant since July 8, 1952.

2. The defendant, Union Carbide Corporation ("defendant" or "Company"), is a corporation organized under the laws of the State of New York and does business in all fifty states, including the State of North Carolina. The defendant maintains its corporate headquarters in New York City, New York.

3. The defendant operates a battery manufacturing facility in Charlotte, Mecklenburg County, North Carolina ("Charlotte plant").

4. The majority of the work performed (80-90%) at the Charlotte plant is pursuant to contracts with various

federal agencies and the majority of these contracts are with the Department of the Army.[1]

5. The hourly paid work force at the Charlotte plant is organized into approximately sixteen (16) departments. The departments and a general description of the work performed in each are as follows:

Department 107: Blends proper amounts of ingredient into mixes to be used in the manufacture of Magnesium and LeClanche cells.

Department 161: Produces magnesium cells to be used in the manufacture of magnesium batteries.

Department 208: Produces LeClanche flat cells by the non-refrigerated method and ties into appropriate stacks for subsequent use in scheduled LeClanche battery types.

Department 209: Produces LeClanche flat cells by the refrigerated method and ties into appropriate stacks for subsequent use in scheduled LeClanche battery types.

Department 210: Repairs cell stacks rejected at testing in the battery finishing department.

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1. By virtue of the fact that the majority of the work performed by the defendant at its Charlotte plant is pursuant to contracts with the federal government, the defendant is subject to Executive Order 11246 and the Regulations implementing this Order. See Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 984, n.3 (5th Cir. 1969), cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1969). Executive Order 11246 is a federal regulation that requires all employers subject to this Order not to discriminate against its employees or applicants for employment because of race, color, religion, sex or national origin. Executive Order 11246 became effective on October 24, 1965. 30 F.R. 12319; 3 C.F.R. 339. This Order was amended by Executive Order 11375, signed on October 13, 1967, which became effective in part on November 12, 1967, and in part on October 14, 1968, by substituting the word "religion" for "creed" as a prohibited basis of discrimination, and by adding sex as a prohibited type of discrimination. 32 F.R. 14303.

Department 215: Produces LeClanche round cells to be used in the manufacture of LeClanche batteries.

Department 225: Assembles all required parts into finished batteries.

Department 235: Manufactures parts to be used in the production of cells and finished batteries.

Department 300: Cleans-up plant and machinery.

Department 304: Provides employee relations department duties, such as pick-up and deliver mail; picks-up machinery parts; operates the canteen and operates the cash register in the cafeteria.

Department 311: Cooks, serves meals and cleans-up cafeteria.

Department 327: Provides upkeep of the plant building and services, installs, repairs, builds and maintains plant equipment.

Department 342: Warehousing-shipping-receiving, and supplying parts for the manufacturing departments as requested.

Department 354: Provides production line inspection of all operations.

Department 355: Sets up and checks on all inspection procedures within an assigned area.

Department 440: Machine operator adjuster.

6. There are over 160 different job classifications in the 16 departments at the Charlotte plant. The overwhelming majority of these job classifications are unskilled jobs.

7. The wage rate of each job is determined by the job class to which it is assigned. Unskilled jobs are designated as job classes 1 through 12 with job class 1 with the lowest rate and job class 12 with the highest rate. Skilled jobs are separately designated as job classes 1 through 7 and are some of the highest paying jobs at the Charlotte plant.

8. The majority of the female employees as of July 2, 1965, and August 8, 1972, were employed in unskilled job classes 1-7. All of the female employees in job class 9 were employed in departments 225 and 355; these departments have been two of the departments in which females have been employed.

9. Many of the jobs designated as "heavy" jobs do not, in fact, have a weight lifting (or exerted force factor) of 30 pounds or more. For example, the oiler's position in department 327 has an average exerted force of 15 pounds 50% of the time during the course of an eight-hour working day; outside warehouse operator in department 342 has an average exerted force of 2 pounds 75% of the time and 30 pounds 5% of the time; round cell machine operator/adjuster in department 440 has an average exerted force of 18 pounds 33% of the time and a maximum force of only 70 pounds 1% of the time; and process repair in department 225 has an average exerted force of 5 pounds 25% of the time (or 10 pounds 10% of the time) and only 85 pounds 1% of the time.

10. On July 2, 1965 (the effective date of Title VII), July 2, 1970, and August 18, 1972 (the date the complaint was filed in this Court) the staffing of the various departments by sex at the Charlotte plant was as follows:

Department	7-2-65		7-2-70		8-18-72	
	M	F	M	F	M	F
161	—	—	—	—	4	7
107	6	—	4	—	3	—
208	23	49	8	19	6	17
209	18	37	11	29	6	17
210	—	—	—	3	1	5
215	—	—	—	—	—	—
225	74	57	37	65	50	77
235	19	5	15	2	11	1
300	14	—	9	2	5	8
304	—	—	1	—	—	1
311	2	3	1	4	1	4
320	—	—	2	—	2	—
327	36	—	39	—	44	—
342	10	—	10	—	12	—
354	—	38	—	31	—	29
355	17	2	12	3	11	7
440	9	—	7	—	7	—
Totals	228	191	156	158	163	173

11. An analysis of the work force by sex as set forth in Finding No. 10 above shows the following:

(a) As of July 2, 1965, there were 419 hourly paid employees at the Charlotte plant; of these 228 were males and 191 were females. Of the 191 females, 181 or approximately 95% of the females were employed in only four (4) of the sixteen (16) departments (208, 209, 225 and 354). Only 115 or 50% of the males were employed in these same four departments. There were no males in department 354 and no females were employed in department 327 (skilled trades department).

(b) As of July 2, 1970 (five years after the effective date of Title VII), there were 314 employees; of these 156

were males and 158 were females. Of the 158 females 144 or approximately 91% were employed in only four (4) of the sixteen (16) departments (208, 209, 225, 354) and 56 or approximately 36% of the males were employed in these same four departments. There were no males in department 354 and no females in department 327.

(c) As of August 18, 1972 (date complaint filed), there were 336 employees, of these 163 were males and 173 were females. Of the 173 females, 140 or approximately 181% were employed in only four (4) of the sixteen departments (208, 209, 225 and 354), whereas only 62 or 38% of the males were employed in these same four departments. There were no males in department 354 and no females in department 327.

12. An analysis of Plaintiff's Exhibits 19(A) through 19(I) (Labor Reports) shows that the overwhelming majority of the females were employed in only four (4) of the sixteen (16) departments (208, 209, 225 and 354). The percentages of females in these four (4) departments ranged from about 96% as of June 1, 1965, to about 78% as of June 1, 1973.

13. The defendant does not maintain lines of progression within the departments. Promotions, demotions, transfers, layoffs and recalls are governed by "company service credit" which is the seniority standard.

14. Company service, *i. e.*, seniority, is the length of time an employee has been employed at the Charlotte plant from his or her most recent date of hire *minus any and all times* during which the employee has been on layoff because of a reduction in the work force. For example, the plaintiff, originally employed on July 8, 1952, has a company service date of July 21, 1956 for job progression and lay-off purposes. Plaintiff's seniority standing has been reduced by approximately four years because of five

lay-offs she was forced to take before July 2, 1965, and the several times she has been laid off since July 2, 1965 (January 23, 1970 and April 18, 1973).

15. From 1956, when the Charlotte plant re-opened, until November 18, 1969—more than four years after the effective date of Title VII—the defendant maintained an open and declared policy and practice of segrating its work force based on sex.

16. The job assignment policy set forth in the 1959 employee handbook provided that:

> For the purpose of job placement, increases and reduction in force, the following related job groups have been established:
>
> (1) All female jobs and (2) all male jobs, except as may be included in other special groups as machine shop, routine inspection, mail service employees, female service employees, etc.
>
> Job assignment procedures [*i. e.*, promotions, demotions lay-offs and recalls] shall be applied within each job group separately and action resulting therefrom shall be limited to each such group. (Brackets supplied).

17. The job assignment policy set forth in the 1964 employee handbook provided that:

> For the purpose of job placement, increases and reductions in force, the following related job groups have been established:
>
> (1) All female jobs except those included in Group #2.
>
> (2) Female employees—Control Laboratory.
>
> (3) All male jobs except those included in Groups #4, 5 and 6.
>
> (4) Machine Shop.

(5) 440 Department.

(6) Male employees—Control Laboratory.

Job Assignment procedures shall be applied within each such group separately and action resulting therefrom shall be limited to each such group.

18. The number of jobs limited to males was almost twice the number of jobs available to females.[2]

19. Prior to June 23, 1965, separate male and female seniority rosters were maintained. Males were hired into, promoted to, and laid off from those jobs limited to males and were credited with company service (seniority)[3] only as to the male jobs. The same practice was followed with respect to the jobs limited to females.

20. Prior to July 2, 1965, female employees were allowed to perform male jobs if they so requested; however, if females took male jobs, they were not allowed to qualify for the jobs, nor could they keep the jobs to avoid lay-offs because of the defendant's strict policy and practice of laying off employees based on the sex-segregated seniority rosters.

21. One result (but an important result for purposes of this case) of the separate male and female job classifications and seniority rosters set out in Findings 15, 16, 17, 18 and 19, *supra*, was that it was possible, and indeed did occur, that female employees would be laid off on the basis of their company service as compared to other females, while male employees with less company service and/or even later dates of original hire were retained. Whenever

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2. Defendant, in answers to interrogatories (Plaintiff's Exhibit 2(B)), identified approximately 97 jobs (including the trainees II and I and the A and B classifications in department 327) as exclusively reserved for males, and approximately 47 jobs as exclusively reserved for females.

3. See Finding No. 14, *supra*.

this situation did occur, the junior males who were retained gained company service and the females who were laid off lost company service.[4]

22. The result set out in Findings No. 21 is exactly the situation of what has happened to the plaintiff. The plaintiff was initially hired at the Charlotte plant on July 8, 1952. Between July 8, 1952 and August 20, 1973 she was laid off seven (7) times, thereby losing company service of about four years. A summary of plaintiff's layoffs is as follows:

Hired 7-2-52	Original company service (CS) date of 7-2-52
Laid off 12-13-53 Rehired[5] 5-2-55	Adjusted CS 11-14-53
Laid off 7-15-55 Rehired 9-28-55	Adjusted CS 1-25-54
Laid off 2-24-61 Rehired 8-21-61	Adjusted CS 7-21-54
Laid off 9-28-62 Rehired 2-11-63	Adjusted CS 12-3-54
Laid off 4-3-64 Rehired 1-25-65	Adjusted CS 9-25-55
Laid off 1-23-70 Rehired 7-20-70	Adjusted CS 3-20-56
Laid off 4-18-73 Rehired 8-20-73	Adjusted CS 7-21-56

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4. The opposite result could also occur, and did. But see Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), reversing in part, 272 F.Supp. 332, 344-345 (N.D.Ind. 1967) where the district court found that the sex segregated seniority system there involved had a similar effect on males and females as in the instant case.

5. Recall from lay-off is referred to as a "rehire".

23. All of the lay-offs in which plaintiff was involved prior to 1965 were the result of the sex segregated policies of the defendant; none of these lay-offs were the result of pregnancy leaves.

24. The following males have original hire dates subsequent to that of the plaintiff and none of them have been laid off at any time, including the January, 1970, and the April, 1973 lay-offs in which plaintiff was involved. Each has as his company service date his date of original hire; thus each has a competitive advantage as to seniority standing for job progression and protection from lay-offs superior to that of the plaintiff:[6]

Name	Date of Most Recent Hire	Company Service
George Hall	2- 6-56	2- 6-56
Bonner David Twitty	1-11-56	1-11-56
Carroll J. Stokes	1- 2-56	1- 2-56
Willard Paige	11-28-55	11-28-55
Hallbrook McCaw	11-14-55	11-14-55
Craig Barbee	10-31-55	10-31-55
Marvin Sutton	10-31-55	10-31-55
Bobby Joe McCorkle	10-31-55	10-31-55
Howard Morris	10-26-55	10-26-55

25. The following table shows the average time lost from company service credit ("company seniority" as currently defined by the defendant) of males and females within the same year of hire as of the week ending November 26, 1972:

6. Other male employees who were initially employed after the plaintiff and who have a superior competitive seniority standing are set forth in Laslie's deposition (Plaintiff's Exhibit 9(A)), and Plaintiff's Exhibit 36(B), which shows hire dates and company service dates of male and female employees.

Average Time Lost By Males and Females Between Year of Hire and Week Ending November 26, 1972.[7]

Year of Hire	MALE (Average)		FEMALE (Average)	
	Months	Days	Months	Days
1952	10	26	66	20
1953	14	4	(no hires shown)	
1954	(no hires shown)		(no hires shown)	
1955		5	69	3
1956	1	26	85	17
1957	15	6	(no hires shown)	
1958	13	10	122	14
1959	(no hires shown)		(no hires shown)	
1960	7	25	(no hires shown)	
1961	11	20	50	
1962	10	16	(no hires shown)	
1963	10	18	(no hires shown)	
1964	8	15	(no hires shown)	
1965	9	20	24	3
1966	15	16	25	18
1967	18	12	25	1
1968	25	19	31	27
1969	27	13	(no hires shown)	
1970	10	6	16	7
1971	8	7	10	29

7. The table is based on Plaintiff's Exhibit 36(B). The table was prepared by the plaintiff as follows: First, the difference in months and days between hire date and company service date as of November 26, 1972 was determined. This total was computed for each male hired in the same year and divided by that number. The same procedure was used for females. Each month was assumed to be 30 days with the exception of those

(Footnote continued on following page)

26. In June, 1965, just over a week before the effective day of Title VII (July 2, 1965), the defendant adopted a twenty-five (25) pound weight limitation policy. This policy was announced to employees at the Charlotte plant on June 23, 1965, by the plant manager. The pertinent portion of that policy is as follows:

> Beginning July 2, 1965, in order to comply with the effective date of the new Civil Rights Act, we will consider men and women, based on Company Service, for any job opening for which they can meet the qualifications. Only in cases where State or Federal law place restrictions on use of females will a job be considered as a "Male job" only. Generally, for instance, most state laws prohibit the employment of females in plants on the following occupations or capacities: "freight handling, trucking, or the frequency or repeated lifting of weights over 25 pounds". *The State of North Carolina leaves the weight factor to the judgment of management. In order that our plants may have a consistent policy, we have adopted the 25 pound maximum weight limitation.* North Carolina does have a law restricting all female employees to a maximum of a nine hour day in a manufacturing plant. We will, of course, have to comply with this and use this law in determining whether or not a job will be male or female. In addition, the duties of such job as janitor or matron may require limiting them to male and female employees.

(Continued from previous page)

employees who had a hire date or service date that falls on the 31st day of the month. For example, entry No. 316, p. 12 of Plaintiff's Exhibit 36(B), Leazer—1578, male, hire date 12-31-58, continuous service date 12-31-58. Fractions of days equaling .5 and below were dropped and fractions of days exceeding .5 were added to the total; *e. g.*, 20.42 days was entered as 20 days and 19.55 days was entered as 20 days.

> *This makes it necessary to abolish our present practice of having separate male and female employee seniority groups other than those jobs requiring specific skills, such as machine shop, 440 department, and Routine Process Inspector.*
>
> In the future job placement procedures, as well as laying-off and rehiring employees, will be handled on the basis of length of service[8] regardless of whether it is a male or female, except in such instances where the job requires males only or females only. (Emphasis supplied).

27. The State of North Carolina does not have (and never did have at any time material to this case) a law imposing a weight limitation on jobs females could perform, and the decision to adopt a weight lifting requirement was based on federal court decisions from other jurisdictions.

28. The twenty-five pounds weight limitation policy adopted by the defendant in June, 1965, was a new policy and was used to designate jobs as either male jobs or female jobs. Jobs requiring lifting or an exerted force[9] of twenty-five pounds or less were considered female jobs and jobs requiring exerted force of twenty-five pounds or more were considered male jobs. See Finding 9, *supra*.

29. The defendant, at or about the same time that it adopted the weight lifting requirement, abandoned its sex segregated jobs and rosters and classified the jobs as "male"

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8. "Length of service" is the same thing as company service. See Finding No. 14, *supra*.

9. The terms "weight lifting" and "exerted force" may be used interchangeably herein, but both terms will have the same meaning whenever used. The term "exerted force" is the term used in the job analyses (Plaintiff's Exhibit 24(A)), whereas the term "exerted force (or lifting)" may be used in the job descriptions (Plaintiff's Exhibit 24(B)).

or "either". The jobs classified as "either" were open to males and females whereas the jobs classified as "male" were limited solely to males. All of the jobs previously reserved for females were opened to males; however, only a few jobs previously reserved for males were opened to females.

30. The restriction on jobs designated as "male jobs' instituted in June, 1965, remained in effect until November 18, 1969, and female employees were not considered for these jobs and were not given the opportunity to demonstrate their ability to perform these under any circumstances.

31. In addition to the weight restriction to carve out certain jobs for males, the defendant also relied on N.C.G.S. § 95-17 which limited the number of hours an employer could employ a female person to not more than forty-eight hours a week, or nine hours in any one day, or on more than six days in any period of seven consecutive days. However, between July 2, 1965, and November 18, 1969, when the defendant of its own accord eliminated the restriction on the number of hours a female could work in any one week, the work schedules established at the Charlotte plant were so arranged such that if females were allowed to qualify for male jobs, the defendant would not have been in violation of N.C.G.S. § 95-17.

32. As a result of the policies and practices set out in Findings 28 and 29, the plaintiff, between July 2, 1965, and November 18, 1969, was denied the opportunity to qualify for certain jobs reserved for males because of her sex on the basis of the defendant's stereotyped characterization of the sexes without regard to plaintiff's individual preferences and ability.

33. On November 18, 1969, a notice was posted on the bulletin boards at the Charlotte plant announcing the adoption of a new policy. The pertinent portions of that November 18, 1969, notice are as follows:

> From a plant standpoint we will be guided by these new decisions, and put into effect the following changes immediately:
>
> 1. *All* restrictions regarding the *number of hours a woman can work in any one day or week are eliminated.*
>
> 2. Job offering procedures will be handled as follows:
>
> a. Jobs having weight lifting requirements of thirty pounds or less, which are referred to as "Light" jobs will be offered according to the present regular job placement procedures. (This represents no change).
>
> b. Jobs requiring lifting of over thirty pounds, or comparable exerted force, referred to as "heavy" jobs, will be offered to men in accordance with present procedure. *However, any female may request any* "Heavy" job and will be considered, in line with her company service credit, for such opening. Naturally all qualifications for and requirements of the job would have to be satisfactorily met.
>
> 3. *In case of a reduction-in-force, a female employee will not be forced into a "heavy" job, and may elect lay-off if that is the only job available. The practice of not forcing a female employee to take "heavy" jobs will also be followed on any reduction within any department or related group.* (Emphasis in the original).

34. The thirty-pound weight limitation adopted in November, 1969, as was the twenty-five pound limitation adopted in June, 1965, was based on court decisions and was used to distinguish between male and female jobs.[10]

35. The notice of the policy change announced in November, 1969, provided that female employees had to request heavy jobs. The intendment of this notice was that if females did not specifically request "heavy" jobs, they would not be considered for the "heavy" jobs. Although Moffitt, the then Charlotte plant manager, testified that a decision was made at the corporate level that the part of the November, 1969 policy providing that females had to specifically request heavy jobs would not be enforced, he also testified that his corporate decision was never formally announced to the employees.

36. Male employees were automatically considered for heavy jobs as a result of the November, 1969 policy change; they did not have to specifically request these jobs. In addition, male employees were eligible for all jobs previously

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10. Several months before the November 1969 announcement, a memorandum from the defendant's Rocky River, Ohio, Divisional Headquarters was sent to the plant manager at the Charlotte plant stating, *inter alia*:

> Subject: Weight Limitations—Female Employees
> *Several months ago a study was made to determine the effect of allowing women to lift more than 25 pounds at our plants and warehouses.* The study was precipitated by recent Federal Court decisions which ruled that the use of 30 and 35 pound weight limitations in establishing female jobs is considered to be reasonable and fair. These court cases were brought about by female employees who questioned a company's right to set a maximum weight limit on the weight females could lift. In view of this development and the fact that questions had been asked by a few of our hourly female employees about this matter, we felt we should reconsider our long-standing position of limiting female employees to a 25 pound maximum. *After considering all factors we feel we can increase the maximum lifting limitations to 30 pounds* and be within what would be considered to be a fair standard. (Emphasis supplied).

reserved for females as a result of the policy adopted by the defendant in June, 1965. Finding No. 29, *supra*.

37. The decision to institute a weight-lifting limitation for female jobs at the Charlotte plant was made at the defendant's Divisional Headquarters in Rocky River, Ohio. The weight-lifting requirement was made applicable to the Charlotte plant because the defendant wanted the policy to be consistent at all of its plants. The defendant's weight lifting limitation policy was based on the Ohio statute, R.C. § 4107.43, which prohibited the employment of females in jobs requiring frequent or repeated lifting in excess of 25 pounds.

38. In 1972 the Ohio Supreme Court in Jones Metal Products Co. v. Walker, 29 Ohio St.2d 173, 281 N.E.2d 1 (1972) ruled that R.C. § 4107.43 was pre-empted by Title VII under the Supremacy Clause of the Constitution and that it could not be enforced in Ohio for that reason. The United States District Court for the Southern District of Ohio reached the same results on March 24, 1971 in Ridinger v. General Motors Corp., 325 F.Supp. 1089, 1093-1097, and the Sixth Circuit in General Electric Co. v. Hughes, 454 F.2d 730 (1972) affirmed the granting of an injunction against appropriate officials of Ohio in the enforcement of R.C. § 4107.43.

39. The policy announced in the November 18, 1969, notice remained in effect until shortly before the January 19, 1973, lay-off. In January, 1973, the defendant notified the employees that beginning with the job moves associated with the January 19, 1973, lay-off, men would be offered the opportunity to accept lay-off rather than being forced to take a "heavy" job.

40. The defendant's thirty-pound weight limitation policy has not been eliminated; it remains in full force and

effect, notwithstanding the fact that the defendant in November, 1969, eliminated its policy of not allowing females to work on certain jobs because of defendant's alleged reliance on N.C.G.S. § 95-17 (Finding No. 31, *supra*), even though the Attorney General of North Carolina issued an opinion on November 25, 1969 (40 N.C.A.G. 363) stating that N.C.G.S. § 95-17 would be enforced, and notwithstanding Finding No. 38, *supra*.

41. The policies and procedures for filling vacancies at the Charlotte plant are as follows:[11]

(a) Employees within the particular department where the vacancy occurs are given first preference. This preference is, in effect, departmental seniority. (See Plaintiff's Exhibit 17 which is an announcement made to employees on January 13, 1970, wherein it was stated "... our regular job-filling procedure *has* always recognized departmental rights".)

(b) Second preference is given to employees in other departments who have, prior to the time the vacancy

11. Both the procedure for filling job vacancies and for reduction in the work force (lay-offs) involve all kinds of modifications and priorities. Compare Plaintiff's Exhibit 3(B), pp. 59-73; Plaintiff's Exhibit 3(D), pp. 65-83, and Plaintiff's Exhibit 3(E), pp. 68-80. Officials of the Company have recognized that these procedures are complicated. Shore, plant manager, so testified. (See also Plaintiff's Exhibit 9A, Laslie, p. 71, "It is complicated"; Plaintiff's Exhibit 11, Humphreys, p. 52). A more apt description is "confusing". The Court will not attempt to summarize all of the modifications and priorities for the reason that most of the more detailed modifications and priorities probably will be eliminated as a result of the modifications that will be ordered.

The Company has abandoned its practice with respect to the use of "home department" in determining the priorities for filling vacancies. However, reference to "home department" was still used in setting forth the vacancy filling procedures in the 1973 Employee Handbook. Presumably, the Company will delete the reference to "home department" in the next printing of the handbook.

occurs, submitted a written request for a transfer to the department in which the vacancy occurs, and the desired shift must be indicated on the request for a departmental transfer.[12]

(c) A request for departmental transfer is valid only until the employee has accepted, refused or is laid off.

(d) Notices of vacancies are not posted and employees must rely on word-of-mouth information about vacancies.

(e) The only reason advanced by the defendant for not posting vacancies is that it has never been the policy of the company to do so.

(f) A regular job vacancy is defined as a job opening which is expected to exceed or does exceed two (2) weeks duration and does not result from disability, scheduled vacation, leave of absence or loan of the regular job holder. All other vacancies are temporary vacancies, including job openings of regular employees who are absent due to disability not to exceed 26 weeks.

(g) The significance of defining a temporary vacancy so as to include job openings due to disability is that employees who cover the jobs during the period of disability assume the company service standing of the

12. The defendant has a separate form which is used in connection with a job change within a particular department. Requests for departmental transfers are filed with the Head of Employee Relations; requests for job changes within departments are filed with the departmental supervisor.

If an employee does not specifically request a transfer to department 327 (skilled trades) on the request for departmental transfer, generally the employee will not be considered for vacancies in 327.

The 1973 Employee Handbook provided that an employee could not specify a specific job in the request for departmental transfer.

disabled employees and assume all of the job rights of the absent employee.

42. The policy of the defendant to give first preference to employees in the department in which vacancies occur puts female employees at a competitive disadvantage *vis-a-vis* their male counterparts because the overwhelming majority of the female employees are in only four of the sixteen departments. See Findings 10, 11 and 12, *supra*.

43. The lay-off procedures presently in effect at the Charlotte plant as of January 13, 1970, are set forth in Exhibit A attached hereto.

44. The lay-off procedures set forth in Exhibit A attached hereto are the same procedures used in the April 18, 1973 lay-off, except that males were given the option of refusing to take "heavy" jobs.

45. In addition to the lay-off procedure set forth in Exhibit A hereto, the following practices are applicable to lay-offs:

(a) Lay-offs are based on company service.

(b) None of the lists of employees to be laid off (original or final) are posted.

(c) Jobs to be operated during lay-off are not posted and employees are notified of whatever jobs may be available to them by word of mouth.

(d) Job rights of absent disabled employees are exercised by less senior employees who are performing the jobs of the absent disabled employees. See also Findings 42 and 43, *supra*.

(e) Prior to the April, 1973, lay-off, employees in department 327 (skilled jobs), 355 (routine or process inspectors) and 440 (machine adjusters) were not subject to the lay-off procedures applicable to other employees. The jobs in these departments are some of the highest paying, nonsalaried positions at the Charlotte plant. Traditionally, the positions in these departments have been reserved for male employees. See Finding No. 7, *supra*. Employees entering into these departments are required to pass several tests. See Findings Nos. 49 and 59, *infra*. However, female employees were not permitted to take these tests until late 1970.

(f) Male employees in departments 327, 355 and 440 who were laid off out of these departments had a choice of either accepting lay-off from the department, or if they had enough company service and had been upgraded from one of the production departments, they could "bump down" into production to avoid lay-off.

(g) In April, 1973, the special protection given to employees in departments 355 and 440 was eliminated and jobs in these departments were subject to regular lay-off procedures. The special protection for male employees in department 327 was not removed and employees in this department continue to enjoy special protection.

46. Prior to recalling any employees from lay-off, employees then in the plant are given first preference to available job vacancies. One of the officials of the Company described the effect of the longstanding policy and practice by stating that ". . . when we were going to increase our production the first thing that we would do is that we would re-arrange the plant and therefore, as a rule, the *more desirable jobs* are taken by those people who are in the plant and *the less desirable* jobs are left for new people being hired or people being called back from lay-off."

47. The defendant does not have any standarized procedure for advising employees on lay-off of the availability of job openings. In some instances employees are notified by telephone; in other instances they are notified by letter simply stating that jobs are available without specifying what jobs are available; yet in other instances, employees are notified by letter that jobs are available and the available jobs are listed.

48. Ninety-five percent (95%) of the female employees who have been laid off have returned as compared to sixty to seventy percent (60-70%) of the males who have returned from lay-off.[13]

49. Between 1950 and 1952 the defendant adopted the Test of Mechanical Comprehension ("Bennett Mechanical") and the Modified Alpha Examination, Form 9, that persons interested in jobs in departments 327, 355 and 440 were required to successfully pass before they were considered for these jobs.[14] Incumbent male employees already in these departments at the time tests were instituted were not required to take or pass these tests in order to retain their jobs.

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13. The high rate of return of females from lay-offs formed the basis for the defendant to conclude in its 1973-74 Affirmative Action Plan that the Charlotte plant has been a desirable place for women to work and that the defendant had experienced no difficulty in obtaining female employees with requisite skills to fill jobs.

14. Different passing scores on each test were established for each department:

Department	Alpha	Mechanical Comprehension
440	75	33
327	85	35
355	100	30

50. Female employees were not allowed to take the Modified Alpha and the Bennett Mechanical until late 1970.[15]

51. Between 1965 and August, 1970 (before any females were permitted to take the tests), over 100 males were permitted to take the Modified Alpha and the Bennett Mechanical; of these, more than twenty (20) had scores sufficient to qualify them for consideration for employment in either 327, 355 or 440. (See Plaintiff's Exhibit 33, *e. g.*, Entries Nos. 3, 4, 9, 13, 14, 15, 16, 30, 33, 38, 39, 40). Many others had scores sufficient to qualify them for jobs in at least one of the departments.

52. Of the fourteen (14) females who took the Bennett, only three had scores sufficient to qualify them for jobs in department 327 (*Id.*, Entries Nos. 131, 139, 157, and 159). Moreover, defendant's own expert witness testified that males tend to score higher than females on the Bennett.

53. Of the females who took both the Bennett and the Modified Alpha, only one (1) scored sufficiently to qualify her for a position in either of the three departments (*Id.*, Entry No. 131).

54. Of the 132 males and the 17 females who took the Bennett Mechanical between 1965 and December, 1970 (when test discontinued), the average (mean) score for females was 25.44 and for men 34.02—a difference of 8.58 points. A larger percentage of males than females received scores exceeding the passing or cut-off levels on the Bennett necessary for consideration for promotion to vacancies

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15. The plaintiff testified that she was not aware of the tests until shortly before she first took the tests in 1970. The Plaintiff's Exhibit 33, which was compiled from Plaintiff's Exhibit Nos. 14c and 15c which are documents showing the test scores of employees, males and females, who took the Bennett Mechanical and the Modified Alpha.

in departments 327, 355 and 440. The highest cut-off score for obtaining a job was 35 (department 327). Fifty-seven percent (57%) of the males but only twenty-four percent (24%) of the females who took the Bennett scored above 35. The lowest cut-off score for a job was 30 (department 355). Sixty-seven percent (67%) of the males and only forty-one percent (41%) of the females scored above 30. (This Finding is based on Plaintiff's Exhibit 33).

55. On the Modified Alpha, a general intelligence test, females who took the test had a mean score of 76.97 and males had a mean score of 79.56 (*Id.*).

56. Defendant's own testing expert testified on direct examination that females tend to score less well on the Bennett than do males.

57. In December, 1970, the defendant stopped using the Bennett Mechanical and the Modified Alpha and on June 30, 1971, and so notified its employees. The decision to discontinue these tests was made by the then plant manager, Moffett.

58. The Modified Alpha and Bennett Mechanical were never validated (*i. e.*, shown to be job related) because it was determined by the defendant that the size of the sample at the Charlotte plant would not be large enough to be statistically significant.

59. On July 30, 1971, one month after the employees had been notified that the modified Alpha and Bennett Mechanical had been discontinued, the defendant substituted new test requirements for departments 355 and 440; and on September 8, 1972, new test requirements were substituted for department 327.

60. A passing score of 70% was established for the new tests. The 70% passing score was established based

on the experience as a teacher of one of the officials at the Charlotte plant.[16]

61. No validation studies were conducted with respect to the new tests.

62. Incumbent employees (all males in departments 355 and 440) were not required to take the new tests in order to retain their jobs and were thus "grandfathered" into their positions in these departments[17] on the basis of tests which the defendant has not demonstrated to be job related.[18]

63. The defendant compiles two company service rosters—one showing the standing of employees by department and another roster showing the plant-wide company service

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16. The official was unable to state whether an employee making a score of 65 on these tests might be able to successfully perform on the jobs in question.

17. There were over sixty (60) males in departments 327, 355 and 440 as of July 2, 1965 as compared to two (2) females (See Finding No. 8, *supra*). See Griggs v. Duke Power Co., 420 F.2d 1225, 1247 (4th Cir. 1970) (dissent by Sobeloff, J.).

18. The EEOC, "Guidelines on Employment Selection Procedures", provide in Section 1607.11 that:

> The principle of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard—even though validated against job performance in accordance with the guidelines in this part—cannot be imposed upon any individual or class protected by Title VII where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority *or sex group* have been denied the same employment, promotion, transfer or membership opportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by Title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force. (Emphasis supplied).

standing. If an employee wants to know his departmental standing he must ask his departmental foreman; if the employee wants to know his plant-wide standing he must go to the Employee Relations Department. Neither of these rosters has ever been posted.[19]

64. The defendant maintains and compiles job descriptions and job evaluations. If an employee has any questions about whether the work he is asked to perform is covered in his job, he has an opportunity to see the job description; however, he is not given the opportunity to see the job evaluation. The job evaluations are more detailed than the job descriptions setting forth such factors as exerted force, training time, rate of pay and other items.[20]

65. Even though the job evaluations may have both an average and a maximum weight lifting or exerted force factor, the job descriptions which are shown to the employees state only the maximum weight lifting or exerted force element.

66. The defendant never had a female foreman at the Charlotte plant until shortly after the complaint was filed on August 18, 1972.[21] Foreman is a salaried position.

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19. Seniority rosters are computerized and are readily available.

20. All or substantially all of the job descriptions and job evaluations contain the following paragraph:

> "The description of this job covers only a general outline of the duties of the job. Due to the varied nature of day time operation, it is impossible to include in detail all of the miscellaneous tasks that the job may require from day to day. In every instance, the operator is expected to produce a full eight-hour's task and that the supervisor, when possible, will endeavor to provide a full eight-hour's work."

21. The defendant had several females who were classified as linesmen during World War II; however, they were hourly-paid employees whereas foremen are salaried personnel (PX 9A, Laslie, pp. 49, 52).

67. The procedure for selecting foremen (forepersons) is as follows: Whenever a vacancy for additional personnel occurs, the Plant Manager, the Head of Employee Relations, and the General Foreman, each makes individual lists of candidates. Each then rates each of the candidates as their first, second and third choices. The respective lists of candidates are then compared and the names of candidates with the most first choice votes are submitted to divisional headquarters in Rocky River, Ohio. Three names are generally submitted to divisional headquarters for a final decision.

68. Frances Black was the first female foreman at the Charlotte plant.

69. Frances Black was employed on January 3, 1967, as a secretary to the Head of Industrial Engineering and held that position until she was promoted to foreman on September 1, 1972. At the time of her promotion to foreman her salary increased from $7,140 to 9,000 yearly.

70. The defendant has hired or promoted more than 20 persons as foremen or salaried personnel since July 2, 1965; of these, only three have been females.[22]

71. None of the female employees promoted to or assigned to foreman or supervisory positions after 1965 were formerly hourly paid employees, whereas a number of the males promoted after this date were formerly hourly paid employees.

72. The procedures used by the defendant for the selection of foremen and salaried personnel are based on purely subjective standards and there are no safeguards

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22. Frances Black, Johnnie Covington and Carol Betzold.

in these procedures designed to avert discrimination against females in selecting foremen and other salaried personnel.[23]

73. As a Federal Government Contractor, the defendant has an obligation to prepare and execute affirmative action programs. See n. 1 *supra*. Notwithstanding the defendant's commitment and obligation to the principle of the affirmative action programs, no efforts were made, nor were any programs established, nor were any detailed analyses of defendant's female work force made until the defendant prepared its 1973-74 Affirmative Action Program.

74. Although the defendant stated in its 1971 Affirmative Action Program that an in-depth analysis of its seniority practices had been made, it simply had not been done.

75. There has never been a labor organization to represent employees at the Charlotte plant.

76. On or about August 22, 1972, shortly after the complaint was filed in this court, the defendant posted a notice on the bulletin board about the filing of the complaint. The notice stated, among other things, that the company had expected a ruling from EEOC that no discrimination was involved prior to the time that the complaint was filed, and that prior to the filing of the complaint in federal court, the company believed that the employment discrimination claim asserted by the plaintiff was more of a personal matter between the company and the plaintiff. The defendant says that notice of the complaint was posted because of media coverage of the filing of the case and the number of questions raised by other employees

23. See Rowe v. General Motors Corp., 457 F.2d 348, 358-359 (5th Cir. 1972).

concerning the filing of the case. The Court finds no impropriety in the posting of the notice.

77. On January 31, 1973 plaintiff accepted a connector's job.[24] Although the plaintiff had worked as a connector before this date and was considered a qualified connector, she had never performed this particular job to which she was assigned in January, 1973. Plaintiff was advised that she would have six days to qualify; however, she was not given any instructions or training prior to the assignment. During the six days qualifying period Jimmy Smith was assigned to plaintiff as back up help, to catch those connections missed by the plaintiff. Jimmy Smith had never before been assigned to do this particular connection on a regular basis when the line was running. Three days after the plaintiff had been on this connection, she requested and received some assistance from Jessie Teeter because she did not believe that she was "catching on" as quickly as she should. At no time during plaintiff's qualifying period did her foreman or supervisor advise her that she was not making sufficient progress or that her reject rate was higher than the established standards, even though both her departmental foreman (C. R. Garner) and her immediate foreman (Clyde Williams) testified that they observed throughout the qualifying period that the plaintiff was not performing at a satisfactory pace. Plaintiff was never advised by her supervisor and foreman that she was not performing satisfactorily until the actual date of her disqualification.

78. On February 9, 1973, plaintiff was notified that she was disqualified as a connector. She was given a choice of "giving up" the job or being disqualified. During the qualification period plaintiff was earning $3.65 per hour;

24. A connector's duties are to connect wires to a battery with the use of a soldering iron.

when she was disqualified, she was assigned to a job at a rate of $3.00 per hour.

79. Plaintiff filed a grievance protesting her disqualification. During the process she discussed the matter with Florence Laslie, Head of Employee Relations. Laslie advised plaintiff at one point that if plaintiff were willing to state that she was "nervous and upset" during the six-day qualification period, the disqualification would be removed from her record and plaintiff would be eligible for future connecting jobs.

80. At the time plaintiff was disqualified in February, 1973, the defendant had a policy that if an employee is disqualified as a connector, the only circumstances under which an employee can return to that classification is if there is a major change in the operation of the job or if there are extenuating circumstances approved by the plant management allowing the person to return to the classification.

81. Notwithstanding the practice set out in Finding 80, *supra*, plaintiff was assigned a different connecting job in the socket department to cover for an employee absent because of illness.

82. When plaintiff was recalled from lay-off, she was advised by John Vann, then Head of Employee Relations, of a number of jobs available to her; however, it was only after plaintiff specifically inquired about a connecting job that she was advised of the availability of this position. She was then advised by Vann that the rate of pay for connecting was $3.80 per hour; however when she returned to work from recall to a connecting position she was given a learner's rate of $3.65 per hour, and had to qualify for the position again.

CONCLUSIONS OF LAW

1. The Court has jurisdiction under Section 706(f)(1), of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(f)(1). (Ruling of the Court made during the trial).

2. The defendant Union Carbide Corporation is an employer within the meaning of Section 701(b) of Title VII, 42 U.S.C. Section 2000e(b) and is engaged in an industry affecting commerce within the meaning of 42 U.S.C. Section 2000e(b).

3. The plaintiff has complied with the procedural requirements of Sections 706(b),(e) and (f)(1) of Title VII, 42 U.S.C. Sections 2000e-5(b), (e) and (f)(1).

[1] 4. The relevant time period for determining defendant's liability and plaintiff's entitlement to relief is at and before the suit was filed. While the defendant's more recent practices may have a bearing on the question of relief, they do not affect the determination whether the defendant previously violated Title VII. United States v. International Brotherhood of Electrical Workers, Local No. 38, 428 F.2d 144, 151 (6th Cir. 1970), cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582 (4th Cir. 1972); cert. denied sub nom., Local 268 Broth. of R. R. Trainmen v. United States, 411 U.S. 939, 93 S.Ct. 1893, 36 L.Ed.2d 401 (1973); United States v. Central Motor Lines, Inc., 338 F.Supp. 532, 556 (W.D.N.C.1971).

[2] 5. Statistics carry much weight in cases brought under Title VII of the Civil Rights Act of 1964. Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir. 1972), cert. denied, 409 U.S. 982, 93 S.Ct. 319, 34 L. Ed.2d 246 (1972); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); United

States v. Central Motor Lines, Inc., 338 F.Supp. 532, 556 (W.D.N.C.1971); Young v. Edgcomb Steel Co., 363 F.Supp. 961 (M.D.N.C.1973), reversed on issue not here involved, 499 F.2d 97 (4th Cir. 1974).

[3] The statistics in this case which reflect that the overwhelming majority of females, including the plaintiff, in the Charlotte plant are employed in only four (4) out of the sixteen (16) departments, establish a *prima facie* showing that the defendant has discriminated against its female employees because of sex. Wetzel v. Liberty Mutual Insurance Co., 372 F.Supp. 1146, 1154 (W.D.Pa.1974); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969), affirming in part and reversing in part, 272 F.Supp. 332 (S.D.Ind.1967); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).

6. The statistics and other evidence further establish that at the defendant's Charlotte plant females were, as recently as August, 1972, totally excluded from all jobs in Departments 327 and 440.

[4] 7. The *prima facie* case of discrimination in violation of Section 703(a), 42 U.S.C. Section 2000e-2(a) established by the statistics is confirmed by evidence that the defendant has engaged in the following discriminatory employment practices:

A. In June, 1965, the defendant, although abandoning its separate seniority rosters and job classifications based on sex, established categories designated "male" or "either". Females were not considered under any circumstances for those jobs designated as male jobs.

B. In June, 1965, the defendant established a twenty-five (25) pound weight limitation, the effect of which was to continue the male and female job classifications which existed prior to that date.

C. In November, 1969, the defendant adopted a policy of designating jobs as either "heavy" or "light". The defendant also increased its twenty-five (25) pound weight limitation to thirty (30) pounds. The thirty (30) pounds weight limitation and the designation of jobs as either "heavy" or "light" had the effect of distinguishing jobs at the Charlotte plant as either male or female. Females were not considered for jobs designated heavy unless they specifically requested such a job.

D. Female employees were not allowed to take any tests administered for entry into departments 327, 355 and 440 prior to August, 1970; and when the defendant abandoned the Modified Alpha and the Bennett Mechanical because it could not demonstrate that these tests were job related, the employees in these departments, all of whom were males, were not required to take the new tests instituted in 1971 as a prerequisite to retaining their jobs. The new tests instituted in 1971, and which are presently in use, have not been shown to be job related under the EEOC, "Guidelines on Employee Selection Procedures". 29 C.F.R. Section 1607.1-14, 29 C.F.R. 1607; 35 Fed.Reg. 1233 (Aug. 1, 1970).

E. The weight limitation policies established by the defendant are based on sterotyped characterization of females and males because of sex.

[5] 8. Title VII of the Civil Rights Act of 1964 was designed "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent cannot be maintained if they operate to 'freeze' the status quo of prior discrimination practice". Griggs v. Duke Power Co., 401 U.S. 424, 429-430, 91 S.Ct. 849, 853, 28

L.Ed.2d 158 (1971); Collins v. Union Carbide Corp., 371 F.Supp. 260, 264-265 (S.D.Tex.1974); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) and 489 F.2d 896 (7th Cir. 1973); Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va.1968).

[6] 9. Where, as in this case, a company has in the past operated a sexually segregated system of employment in which assignments to particular job classifications and departments were restricted on the basis of sex, the continued reliance on a seniority system (*i. e.*, company service) which gives male employees a competitive advantage over female employees in terms of promotions, transfers, lay-offs and recalls, perpetuates the effects of past discrimination and constitutes a present pattern or practice of impermissible discrimination against female employees, depriving them of employment opportunities and adversely affecting their status as employees because of their sex within the meaning of Section 703(a)(2), 42 U.S.C. Section 2000e-2(a)(2). Bowe v. Colgate-Palmolive, *supra;* Ostapowicz v. Johnson Bronze Co., 369 F.Supp. 522 (W.D.Pa. 1973); Danner v. Phillips Petroleum, 447 F.2d 159 (5th Cir. 1971), affirming 3 EPD ¶ 8336 (W.D.Tex., May 18, 1970); Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971); Chrapliwy v. Uniroyal, Inc., 6 FEP Cases 98 (N.D.Ind., July 5, 1973), and 7 FEP Cases 343 (N.D.Ind., February 27, 1974). See also, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582 (4th Cir. 1972); Rock v. Norfolk & Western Ry. Co., 473 F.2d 1344 (4th Cir. 1973), cert. denied, sub. nom. United Transportation Union, Lodge No. 550 v. Rock, 412 U.S. 933, 93 S.Ct. 2754, 37 L.Ed.2d 161 (1973); United States v. Central Motor Lines, 338 F.Supp. 532 (W.D.N.C.1971); Hairston v. McLean Trucking Co., 62 F.R.D. 651-669 (M.D.N.C.1973); Russell v. The American Tobacco Co., 374 F.Supp. 286 (M.D.N.C.1973); Young v. Edgcomb Steel Co., 363 F.Supp. 961 (M.D.N.C.1973), reversed on ground here not relevant, 499 F.2d 97 (4th Cir. 1974).

[7] 10. Where, as in this case, a company has in the past operated a sexually segregated system of employment in which assignment to, lay-off from and recall to job classifications were done on the basis of sex, the adoption of a job allocation procedure which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice where it operates as a disguised form of classification by sex, and creates unreasonable obstacles to the advancement by females into jobs which females would reasonably be expected to perform. EEOC, "Guidelines on Discrimination Because of Sex", 29 C.F.R. 1604.3(a) and (b); Laffey v. Northwest Airlines, Inc., 366 F.Supp. 763 (D.D.C.1970), order entered 374 F.Supp. 1382 (D.D.C., April 3, 1974); Rinehart v. Westinghouse Electric Corp., 4 EPD ¶ 7520 (N.D.Ohio, August 11 1970); Cheatwood v. South Central Bell T. & T. Co., 303 F.Supp. 754 (N.D.Ala. 1969); Bowe v. Colgate-Palmolive Co., *supra;* Trivett v. Tri-State Container Corp., 368 F.Supp. 137 (E.D.Tenn. 1973); Taylor v. Goodyear Tire & Rubber Co., 6 FEP Cases 50, 57 (N.D.Ala., July 31, 1972) (jobs designated heavy and light).

[8] 11. Where, as in this case, a company has historically classified its employees on the basis of sex, it is impermissible for the company to rely on word-of-mouth notice of job vacancies. Brown v. Gaston County Dyeing Machine Co., 457 F.2d, *supra,* at 1383; United States v. Dillon Supply Co., 429 F.2d 800, 802 (4th Cir 1970).

12. The question whether the defendant discouraged its female employees, including the plaintiff, from accept-

ing heavy jobs in 1970 and thereafter is immaterial to the issue whether the defendant practiced discrimination in its employment practices from and after July 2, 1965. Wetzel v. Liberty Mutual Ins. Co., 372 F.Supp. 1146, 1154 (W.D.Pa.1974).

[9] 13. Under Title VII, 42 U.S.C. Section 2000e-7, reliance on state laws cannot justify discriminatory practices where such laws conflict with federal laws. Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1005 (9th Cir. 1972) (state law on work week for women); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225-1227 (9th Cir. 1971).

[10] 14. Only if a challenged practice is found to be essential to overriding, legitimate, non-sexual business purpose, such as safety and efficiency, can the practice in question be allowed to stand. Robinson v. Lorillard Corp., 444 F.2d 791, 797-798 (4th Cir. 1971) (there must be no acceptable alternative which would better accomplish the business purpose); Griggs v. Duke Power Co., *supra;* Wetzel v. Liberty Mutual Ins. Co., *supra.* The defendant has failed to show that the practices here challenged are supported or required by business necessity.

[11] 15. In order to rely on the bona fide occupation qualification exception set forth in Section 703(e), 42 U.S.C. Section 2000e-2(e) with respect to its weight lifting policy, the defendant has the burden of proving by a preponderance of the evidence that all or substantially all females would be unable to perform safely and efficiently the duties of the jobs involved. Weeks v. Southern Bell T. & T. Co., 408 F.2d 228, 232 (5th Cir. 1969); Bowe v. Colgate-Palmolive Co., 416 F.2d *supra,* at 717-719; Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1199 (7th Cir. 1971); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. Section 1604.3(b). The defendant has not met this burden.

[12, 13] 16. Where an employer has engaged in a pervasive practice of discrimination on account of sex, affirmative and mandatory relief is required in order to insure full enjoyment of the right to equal employment opportunities. In ordering relief, a court should not parrot the Act, but should order affirmative relief which is appropriate to insure the full enjoyment of employment rights. United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1052-1053 (5th Cir. 1969).

17. In such cases the court has not merely the power but the duty to render a decree which will as far as possible eliminate the discriminatory effects as well as bar like discrimination in the future. Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965); Rosen v. Public Service Electric and Gas Co., 477 F.2d 90, 95-96 (3rd Cir. 1973) (sex discrimination).

[14] 18. In order to remedy the present and continuing discrimination based on sex and to remedy the competitive seniority disadvantage to the plaintiff stemming from the defendant's pre-1965 practices of maintaining segregated jobs and rosters, and promotions, transfers, lay-offs and recall procedures based on sex:

A. There must be a modification of reliance on company service seniority and departmental preference in defendant's vacancy filling procedure.

B. The defendant will be required to institute a seniority system based on revised seniority dates for purposes of promotions, departmental transfers, lay-offs and recalls. Collins v. Union Carbide Corp., 371 F.Supp. 260, 266-268 (S.D.Tex.1974); Bowe v. Colgate Palmolive Co., 489 F.2d 896 (7th Cir. 1973), affirming, 6 FEP Cases 1123 (S.D.Ind.1972); Watkins v. United Steel Workers of Amer-

ica, AFL-CIO, 369 F.Supp. 1221 (E.D.La.1974); United States v. Central Motor Lines, Inc., 338 F.Supp. 532, 560 (W.D.N.C.1971); Chrapliwy v. Uniroyal, *supra;* Danner v. Phillips Petroleum Co., *supra;* Guthrie v. Colonial Bakery Co., 6 FEP Cases 663 (N.D.Ga., March 8, 1973).

C. The defendant will also be required to post in conspicuous places throughout the Charlotte plant notice of all vacancies and rosters showing such revised seniority standing of all employees. Young v. Edgcomb Steel Co., 363 F.Supp. *supra,* at 972 (M.D.N.C. 1973), reversed on issue here not relevant, 499 F.2d 97 (4th Cir. 1974). Guthrie v. Colonial Bakery Co., 6 FEP Cases 662, 665 (N.D.Ga., March 8, 1973).

D. The defendant will be enjoined from giving first preference to employees in the plant when vacancies occur during the periods when a reduction in the work force is in effect, and all vacancies at all times will be offered to employees on the basis of the revised date of seniority. Guthrie v. Colonial Bakery Co., 6 FEP Cases 662 (N.D.Ga., March 8, 1973); Bowe v. Colgate-Palmolive Co., 489 F.2d 896 (7th Cir. 1973).

E. The defendant will be enjoined from requiring the plaintiff to successfully pass any tests currently used for jobs in departments 327, 355 and 440 because her male counterparts in these departments were not required to take these tests. Griggs v. Duke Power Co., 420 F.2d 1225, 1231 (4th Cir. 1970) (see also dissent by Sobeloff, J., 420 F.2d at 1247); Ostapowicz v. Johnson Bronze Co., 369 F. Supp. 522, 539 (W.D.Pa.1973); NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974). Russell v. American Tobacco Co., 374 F.Supp. 286 (M.D.N.C.1973); Young v. Edgcomb Steel Co., 363 F.Supp. 961 (M.D.N.C.1973).

F. The defendant's weight lifting limitation policy should be discontinued. Weeks v. Southern Bell T. & T., *supra;* Schaeffer v. San Diego Yellow Cab, *supra;* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.4.

[15] 19. Where employment discrimination has been clearly demonstrated, employees who have been victims of that discrimination must be compensated if economic loss can be established. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); United States v. Georgia Power Co., 474 F.2d 906, 921 (5th Cir. 1973); Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973); Rosen v. Public Service Electric and Gas Co., 477 F.2d 90, 95-96 (3rd Cir. 1973).

[16] 20. The statistics showing the foreman and supervisory work force by sex and the defendant's reliance on subjective criteria for the selection of its supervisory work force demonstrate that defendant has discriminated against its female employees in the selection of its supervisory personnel. Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Gilmore v. Kansas City Terminal Ry., 509 F.2d 48 (8th Cir. 1975); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382-1385 (4th Cir. 1972).

21. The defendant has intentionally engaged in the unlawful employment practices described herein within the meaning of Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(g). Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972).

[17] 22. Plaintiff is entitled to recover her costs and reasonable attorneys' fees as part of her costs.

23. The clerk is requested to set this case for a conference among court and counsel to try to arrive at a method of establishing appropriate revised seniority dates for the plaintiff and other female employees, and to draft an appropriate order.

EXHIBIT A TO FINDINGS OF FACT RULES GOVERNING THE LAYOFF ON JANUARY 23, 1970, AT THE CHARLOTTE PLANT

1. Determine the level of operation needed to meet the demand for batteries.
2. Determine the number of employees needed to operate at this level and make staffing sheets accordingly.
3. Determine the excess number of employees in the plant. This becomes the number of employees to be laid off.
4. Departmental Foreman announced the layoff and explained the effect on this layoff of the new court ruling governing weight restrictions for women. One member from the Plant Manager's Department or Employee Relations Department attended the departmental meetings to help answer questions.
5. Make a temporary layoff list by listing the youngest employee in the plant according to company service until the prescribed number for layoff is reached.
6. On paper, remove the laid off employees from the departments.
7. On the basis of the new requirements, determine the employees to remain in each department and the employees to be set aside on the surplus list.

8. The surplus employees from each department comprise the plant wide surplus list.
9. The jobs left unfilled by the removal of the employees on layoff become the job opening list.
10. After laid off and surplus employees are removed from the departments, rearrangements are made within each department.
11. Those remaining in the departments may turn down jobs within their department. The opening created will be filled by offering it to those employees from that department on the surplus list. If no one wants the opening, the youngest employee in terms of company service from that department will be forced to take the opening. An employee who elects to go on the surplus list loses his home department rights unless it is a case of a woman being offered a heavy job.
12. After all departments have completed their respective rearrangements, the resulting job openings are offered in accordance with company service to those employees who are on the surplus list or who have in requests.
13. Men on the list may take light jobs if they have enough company service to get them. If only heavy openings are left, men are required to take them.
14. Women can take heavy or light openings if their company service warrants. However, women cannot be forced to take heavy openings.
15. The point is reached where there are only heavy openings available and only women are left to take them and they refuse. The youngest employees in terms of company service on light jobs in the plant,

men or women, are removed from their jobs and set aside in their respective departments until a sufficient number of openings for those women on the surplus list is attained.

16. The employees remaining in the departments are then given the chance to rearrange to the resulting openings. Those employees on heavy jobs who have less service than the oldest employee on the surplus list will not be allowed to rearrange to a light job. Those employees on heavy jobs who have more service than the oldest employee on the surplus list are given the opportunity to rearrange to the light jobs. All remaining employees on light jobs may rearrange according to the vacancy filling procedure to light jobs since this does not affect the number of light jobs available.

17. Those employees removed from light jobs then have the opportunity to displace employees in their department on heavy jobs who have less company service than they. The total number of employees on heavy jobs with less company service than those removed from the light jobs are removed from their jobs. The department is again rearranged according to the vacancy filling procedure. The remaining openings are then offered to those employees in the department who have been removed from their jobs to the point where there are still enough light jobs available for the women on the original surplus list.

18. The light jobs created for the women on the original surplus list are then offered to them.

19. All those employees removed from their jobs to create openings for others with more company service are then offered the plant wide openings which in all probability are heavy openings. All men must take

these jobs. Women may take the heavy jobs or elect layoff. For the number of women electing layoff, a corresponding number of men or women will be recalled from the layoff list to fill the heavy openings.

20. Women on the layoff list may elect to take the heavy openings or remain on the layoff list. Men must take the heavy openings.

21. These heavy openings are offered to those recalled from the layoff list according to company service. If one recalled from layoff is from a department where there is an opening, he does not have home department rights but can only get in that particular department if he had enough company service to warrant him a chance.

ORDER AMENDING AND SUPPLEMENTING FINDINGS OF FACT

(Filed July 10, 1975)

This cause coming on to be heard on motion of Defendant for an order amending the findings of fact and conclusions of law heretofore filed by the Court, and the Court having heard arguments of counsel and considered exhaustive proposed changes and additions, it is

Ordered, that the Motion to amend findings of fact is denied as to paragraphs 5, 6, 8, 10, 11, 12, 15, 19, 24, 26, 28, 29, 30, 33, 34, 38 and 40 of Defendant's Motion.

Ordered, that the Motion to add findings of fact is denied as to paragraphs 1, 7, 13, 17, 20, 23 and 48 of Defendant's Motion.

Ordered, that the following additional findings of fact be made:

1. Objections were made by the defendant to the introduction of evidence or to the consideration of evidence as to the charges contained in Plaintiff's Exhibit 1(e), which is the charge dated February 25, 1971, filed by the Plaintiff with the EEOC. After getting all of the files of the Equal Employment Opportunity Commission and examining them, the following is found to be the sequence of events: Plaintiff's letter charge to the EEOC (Plaintiff's Exhibit 1A), dated March 30, 1970, containing certain charges was filed on April 14, 1970. Plaintiff's Exhibit 1B, another letter to EEOC making a complaint, was filed on June 22, 1970. Plaintiff's Exhibit 1C, a charge on EEOC Form 5, was filed on October 19, 1970. Plaintiff's Exhibit 1D, an amended additional charge, was filed on February 16, 1971. The filing of Plaintiff's Exhibits 1A, 1B, 1C and 1D were communicated in due course to the Defendant. A later charge, Plaintiff's Exhibit 1E, is a further charge, dated February 25, 1971, bearing EEOC case File No. TAT1-2569. Plaintiff's Exhibit 1E was missing from the original file received by the Court from the EEOC but was discovered in a separate file, No. TAT1-2569. From the EEOC file stamps and from a communication from the Equal Employment Opportunity Commission, dated October 12, 1971, the Court finds that this charge (Plaintiff's Exhibit 1E) was filed with Mr. Nails of the EEOC on or about February 25, 1971, and it bears a February 25, 1971 stamp of the Atlanta office of the EEOC. The difference in the numbers on these charges results from the fact that the TAT numbered files are original Atlanta files, and when these cases were transferred in the early or middle part of 1971 to the Charlotte District Office of the EEOC, they were given Charlotte file numbers which begin with the code letters TCT. The original Atlanta file in Plaintiff's case, TAT1-2569 is now and since mid-1971 has been Charlotte File No. TCT2-0346. It further appears that on May

27th of 1971, following some findings of the field director, Mrs. Nance wrote the EEOC a lengthy letter referring to the February 25, 1971 claim or charge (Plaintiff's Exhibit 1E) complaining about it and requesting additional action. It further appears that as of April 3, 1972 a formal notice, EEOC Form 131, was sent to the Department giving notice under File No. TCT2-0346 of a charge under date of February 25, 1971, alleging discrimination on the basis of sex in promotions, job classifications, and terms of conditions of employment. Inferentially, this appears to be the charge in question, although the Court can make no positive finding to that effect. From the foregoing, the Court finds that all of the claims advanced in Plaintiff's Exhibit 1E, that is, the charge of February 25, 1971, were fully advanced before the Commission and were considered or should have been considered by the Commission in the preparation of its final action leading up to the issuance of the right to sue letter (Plaintiff's Exhibit 1F). It, therefore, appears that the charges contained in Plaintiff's Exhibit 1E are proper subjects of evidence in this case if they are relevant under the pleadings and general issues raised in the suit. The record is not clear as to when the Defendant actually received notice that the amended charge of February 25, 1971, had been filed. The Court ruled that unless there was some clear-cut evidence that the claims included in the February 25, 1971 charge constituted a complete surprise to the Defendant and that entertaining them at trial would constitute gross unfairness to the Defendant, the Court intended to proceed with the evidence without further inquiry on the particular subject. (Tr. 125-129; Court Exhibit No. 1). The Defendant failed to demonstrate that the February 25, 1971 charge constituted surprise or that it would be grossly unfair for the Court to entertain the claims contained in that charge.

2. More than 80% of Union Carbide's Charlotte production is batteries for the United States military. The level of production and employment fluctuates depending on the Defendant's ability to secure government contracts. The cyclic nature of this business requires frequent layoffs and recalls (Def. Ex. 1, 8a; Tr. 446-448).

3. The Plaintiff has been affected by three layoffs since the passage of Title VII. She was laid off in 1970 and 1973 rather than accept a heavy job. She avoided layoff in 1972 by accepting a heavy sweep and move job in Department 225. The jobs offered to the Plaintiff at the time of all three of these layoffs were based on the Plaintiff's company service standing or seniority which is the subject of Findings of Fact Nos. 19-24 filed April 28, 1975. (Def. Ex. 4; Ex. 10 to Pl. Ex. 9A; Tr. 490, 560).

4. Prior to being laid off on January 23, 1970, the Plaintiff was offered and turned down twenty-five (25) jobs.[1] If she had accepted one of these jobs, she would not have been laid off but would have remained in the plant and continued to accrue Company service (Tr. 478). The Plaintiff was offered jobs in Departments 208, 210, 225, 300, 327, 342 (Def. Ex. 6c, 6d, 6e; Tr. 477-478). Less senior employees accepted the jobs turned down by the Plaintiff and thereby remained in the plant and continued to accrue Company service. The Plaintiff remained on layoff until July 20, 1970.

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1. One (1) feeding job in Department 225; one (1) AC Line takeoff job in Department 225; one (1) A feeder job in Department 225; two (2) sweep and move jobs in Department 225; one (1) line assembly job in Department 225; two (2) upstairs packing jobs in Department 225; one (1) spare heavy job in Department 208; one (1) recovery coordinator job in Department 210; one (1) maintenance job in Department 327; three (3) material handler jobs in Department 342; two (2) heavy janitor's jobs in Department 330; one (1) scrap hauler truck driver's job in Department 342; eight (8) machine cleaner's jobs on second shift (Tr. 477-478).

5. On March 13, 1970, while on layoff, the Plaintiff was offered seven (7) jobs.[2] Had she accepted one of these seven (7) jobs she would have been recalled from layoff. She refused these jobs and they were taken by less senior employees (Tr. 603-605). On May 18, 1970, while still on layoff, the Plaintiff was offered three (3) jobs which she refused.[3] On July 20, 1970, the Plaintiff accepted a job as a conveyor expeditor and was recalled from layoff (Def. Ex. 4; Ex. 10 to Pl. Ex. 9A).

6. On February 7, 1972, the Plaintiff was again involved in a plant rearrangement and layoff. She was forced off of her line assembly job in Department 225 but avoided being laid off by accepting a sweep and move (heavy) job in the same department (Def. Ex. 4; Ex. 10 to Pl. Ex. 9A).

7. On April 18, 1973, the Plaintiff was laid off. Prior to electing layoff, she was offered, and refused, approximately sixteen (16) jobs. Had the Plaintiff accepted one of these sixteen (16) jobs, she would have remained in the plant and continued to accrue Company service (Def. Ex. 7a, 7b, 7c). The Plaintiff remained on layoff until August 20, 1973, when she was recalled as a Connector in Department 225 (Def. Ex. 4).

8. The Plaintiff has been offered jobs in Departments 208, 209, 210, 225, 300, 327, 330, and 342 in connection with the 1970 and 1973 layoffs (Def. Ex. 6c, 6d, 6e, 7a, 7b, 7c; Tr. 477-478, 603-604).

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2. One (1) supply and shovel job in Department 208; one (1) sweep and move job in Department 208; five (5) machine cleaner's jobs in Department 330 (Tr. 603).

3. One (1) material handler's job in Department 342 and two (2) machine cleaner's jobs in Department 300 (Tr. 604).

9. In December, 1970, the Defendant discontinued its practice of requiring candidates for Departments 327, 355, and 440 to take and pass the Modified Alpha and Bennett Mechanical Exams. The Defendant substituted a "Mathematical Skills Inventory" test for candidates for Department 355. The record shows that sixteen (16) employees have taken this new test: eight (8) males and eight (8) females. Of the eight (8) males who have taken this test, five (5) passed and three (3) failed. Of the eight (8) females who took this test, six (6) passed and two (2) failed.

It is further ordered, that the Findings of Fact heretofore filed by the Court be amended as follows:

1. Add the following sentence at the end of finding of fact number 7:

> Skilled jobs specially designated as job classifications 1-7 are all located in Department 327 and include such occupations as electricians, millwrights, mechanics, machinists and welders (Tr. 485).

2. Amend finding of fact number 8 to read as follows:

The majority of male and female employees as of July 2, 1965, and August 18, 1972, were employed in unskilled job classes 1-7. As of August 18, 1972, all of the female employees in job class 9 were employed in Departments 225 and 355. On the same date all male employees in job class 9 were employed in Departments 225 and 355 with the exception of one (1) male employee in Department 235 and two (2) male employees in Department 107. There were forty (40) jobs in wage classification 9 on August 18, 1972; males held twenty-one (21) of these jobs and females held nineteen (19) (Pl. Ex. 35).

3. Amend finding of fact number 9 to read as follows:

> All jobs designated as heavy jobs require an employee to exert a force of thirty (30) pounds or more at least one time per eight (8) hour day. Jobs which do not require an exerted force of thirty (30) pounds are classified as light jobs.

4. Amend finding of fact number 16 to read as follows:

> The job assignment policy set forth in the 1959 employee handbook provided that:
>
> For the purposes of job placement, increases and reductions in force, the following related job groups have been established:
>
> (1) All female jobs and (2) all male jobs, except as may be included in other special groups such as machine shop, routine inspection, male service employees, female service employees, etc.
>
> Job assignment procedures shall be applied within each such group separately and action resulting therefrom shall be limited to each such group.

5. Amend finding of fact number 18 to read as follows:

> Prior to June, 1965, the number of job classifications limited to males was almost twice the number of job classifications available to females (Pl. Ex. 2B, Answers Nos. 14 and 16).

6. Amend finding of fact number 26 to read as follows:

> In June, 1965, just over a week before the effective date of Title VII (July 2, 1965), the Defendant adopted

a twenty-five pound weight standard. This standard, along with hours, was used to classify jobs as "male" jobs or "either" jobs. This new policy was announced to employees at the Charlotte plant on June 23, 1965, by the Plant Manager. The pertinent portion of that policy is as follows:

> Beginning July 2, 1965, in order to comply with the effective date of the new Civil Rights Act, we will consider men and women based on Company service, for any job opening for which they can meet the qualifications. Only in cases where State and Federal laws place restrictions on use of females will a job be considered as a "Male Job" only. Generally, for instance, most state laws prohibit the employment of females in plants in the following occupations or capacities: "freight handling, trucking, or the frequent or repeated lifting of weights over 25 pounds. *The State of North Carolina leaves the weight factor to the judgment of management. In order that our plants may have a consistent policy, we have adopted the 25 pound maximum weight limit.* North Carolina does have a law restricting all female employees to a maximum of a 9 hour day in a manufacturing plant. We will, of course, have to comply with this and use this law in determining whether or not a job will be male or female. In addition, the duties of jobs such as janitor or matron may require limiting them to male or female employees.
>
> *This makes it necessary to abolish our present practice of having separate male and female employee seniority groups other than on those jobs requiring specific skills such as Machine Shop,*

> *440 Department, and Routine Process Inspectors.* In the future job placement procedures, as well as laying off and rehiring employees, will be handled on the basis of length of service regardless of whether the employee is male or female, except in instances where the job requires males only or females only (emphasis supplied).

7. Amend finding of fact number 33 to read as follows:

On November 18, 1969, a notice was posted on the bulletin boards at the Charlotte plant announcing the adoption of a new policy. The pertinent portions of that November 18, 1969, notice are as follows:

> From a plant standpoint we will be guided by these new decisions, and put into effect the following changes immediately:
>
> 1. *All* restrictions regarding the *number of hours a woman can work in any one day or week are eliminated.*
>
> 2. Job offering procedures will be handled as follows:
>
> a. Jobs having weight lifting requirements of 30 pounds or less, which are referred to as "Light" jobs, will be offered according to the present regular job placement procedures. (This represents no changes.)
>
> b. Jobs requiring lifting of over 30 pounds, or comparable exerted force, referred to as "Heavy" jobs, will be offered to men in accordance with present procedure. *However, any* female may *request* any "Heavy" job and will be considered, in line with her Company Service Credit, for such opening.

Naturally all qualifications for and requirements of the job would have to be satisfactorily met.

3. In case of a reduction-in-force, a female employee will not be forced into a "Heavy" job, and may elect layoff if that is the only job available. The practice of not forcing a female employee to take a "Heavy" job will also be followed on any reduction within a department or related job group (emphasis in original).

8. Amend finding of fact number 71 to read as follows:

The Defendant has hired or promoted more than twenty (20) persons to foreman or salaried positions since July 2, 1965; of these five (5) have been females (Pl. Ex. 2A, No. 53).

9. Amend footnote 22 to read as follows:

Frances Black, Johnnie Covington, Carol Betzold, M. B. Hunter, and J. L. Mallonee (Pl. Ex. 2A, No. 53).

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-72-185

WINIFRED S. NANCE,
Plaintiff,

v.

UNION CARBIDE CORPORATION, CONSUMER PRODUCTS DIVISION, a Corporation,
Defendant.

JUDGMENT

(Filed October 14, 1975)

This cause having come on for a trial before the Court, sitting without a jury, and the issues having been duly tried, and Findings of Fact and Conclusions of Law having been entered on April 28, 1975 and amended by order dated July 10, 1975 it is,

HEREBY ORDERED, ADJUDGED AND DECREED:

The defendant Union Carbide Corporation ("the defendant" or "Company"), its officers, agents, employees, successors, servants and all persons in active concert or participation with the Company shall be and are hereby permanently enjoined and restrained from discriminating against the plaintiff because of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq., at the Company's facilities located in Charlotte,

Mecklenburg County, North Carolina. "Company," as used herein shall refer only to the Mecklenburg County, North Carolina, facilities of the defendant.

I. *The Seniority System.*

A. The Company is permanently enjoined from implementing, maintaining or giving effect to any seniority system, policy, or practice, including reliance on Company service credit and departmental seniority as defined in the Company's employees' handbooks, which is designed to or has the effect of discriminating against its female employees because of their sex.

B. The Company is hereby ordered to implement and to continue a system of original hire (or employment) date seniority with respect to all matters for which seniority or length of service is used, including promotions, demotions, lay-offs, and recalls for all work assignments or job vacancies. "Original hire (or employment) date seniority" as used herein shall mean the most recent date of continuous employment with the Company.

C. Vacancy for purposes of this judgment shall mean any job or work assignment which is expected to exceed two (2) or more weeks duration, including but not limited to a work assignment resulting from disability, a scheduled vacation, a leave of absence or a loan or temporary transfer of a regularly assigned job holder.

II. *Lay-Offs of Employees.*

A. On and after the date of the entry of this Order the Company is enjoined from continuing to operate under its present reduction in force lay-off procedures.

B. The Company is hereby ordered to implement the following procedures to govern a reduction in force:

1. After the Company has determined the level of operation needed to meet the demand for batteries during the reduction in force and has determined the number of employees needed to operate at this level, staffing sheets or manning tables showing jobs, by department, to be operated during the reduction in force, shall be posted on bulletin boards in conspicuous places throughout the Charlotte plant for benefit of the employees.

2. The excess number of employees, or temporary lay-off list, shall be initially determined by removing those employees having the least original hire (or employment) date seniority, without regard to department job or work assignment. This list shall be posted on bulletin boards in conspicuous places throughout the Charlotte plant.

3. Employees whose names do not appear on the temporary lay-off list (or remaining employees) are then to be given the opportunity to rearrange or make job selections among those jobs to be operated during the reduction in force based on original hire (or employment) date seniority. The rearrangement shall be conducted without regard to job, department or work assignment. If two or more remaining employees select the same job and there are more employees than positions in the job slots, preference shall be given to the employee (or employees) with the longest original hire (or employment) date seniority.

4. Remaining employees may elect to go on the lay-off instead of exercising their preferences as provided in paragraphs II B 3 herein. If additional employees are needed to perform jobs necessary to meet the demand for batteries during the reduction in force, work assignments shall be offered to those employees on the temporary lay-off list based on original hire (or employment) date seniority.

III. *Recall of Employees.*

The Company is enjoined from giving first preference for job vacancies or work opportunities to employees then working in the Charlotte plant. All employees, including employees actually on lay-off, shall be given the opportunity to bid for all job vacancies or work opportunities based on original hire (or employment) date seniority.

IV. *Weight Lifting Limitation Policies.*

A. The Company is enjoined from implementing, maintaining, or giving effect to any practice or policy of establishing weight lifting requirements for any of the jobs at the Charlotte plant which are designed to or which have the effect of discriminating against its female employees in the terms, conditions and privileges of employment or which are designed to or which have the effect of designating or characterizing jobs as male jobs or female jobs.

B. Female employees who bid for a job vacancy and are entitled to consideration for the vacancy based on original hire (or employment) date seniority shall be given a reasonable opportunity to demonstrate their ability to perform the job. Reasonable opportunity as used herein shall mean a period of not less than two (2) weeks, unless the defendant can establish that a shorter period of time would be ample.

V. *Testing.*

A. The Company is enjoined from requiring the plaintiff to successfully pass any written tests currently utilized for vacancies or work assignments in departments 327, 355 and 440, unless and until such time as the Company can demonstrate to the Court that any test or tests it pro-

poses to use after the date of the entry of this Order has been validated in accordance with the "Guidelines on Employee Selection Procedures," promulgated by the United States Equal Employment Opportunity Commission.

B. The Company is further enjoined from giving preference to any employees for job vacancies or work assignments in departments 327, 355 and 440 who have, prior to the date of the entry of this Order, successfully passed the written tests enjoined herein,

VI. *Postings.*

A. *Job Vacancies and Work Opportunities:* The Company shall post notice of all job vacancies or work opportunities without regard to the department where the vacancy occurs in conspicuous places throughout its Charlotte plant. Further, the defendant is directed to establish a procedure for notifying all employees who may be on lay-off of all vacancies or work opportunities available at the Charlotte plant. All employees, including those who are on lay-off, shall be given the opportunity to notify the Company of their interest in the vacancy or work opportunity in writing, either by signing the posted job vacancy or otherwise. Selection of a candidate from among those employees who have expressed an interest in writing in the job vacancy or work opportunity shall be on the basis of original hire (or employment) date seniority. No later than two (2) days after the vacancy or work assignment has been awarded, the Company shall post the name and the seniority date of the successful candidate (or candidates) in conspicuous places throughout the plant.

B. *Seniority Rosters:* The Company shall post on bulletin boards in conspicuous places throughout the Charlotte plant copies of seniority rosters showing the name, sex and original hire (or employment) date seniority of

each employee. The seniority rosters shall be revised as need be at intervals of no less than every three (3) months.

C. *Job Descriptions and Job Analyses:* The Company shall post a copy of existing job descriptions and job analyses, as from time to time revised, on bulletin boards in conspicuous places at its Charlotte plant. Such descriptions and analyses (a) are for informational purposes only, (b) are not intended to indicate all the duties to be performed, and (c) will be used for no purpose other than to inform employees of the general nature of the job.

VII. *Supervisory Personnel.*

A. The Company is enjoined from implementing, maintaining or giving effect to any criteria or procedure utilized for the selection of supervisory personnel which is designed to or has the effect or discriminating against its female employees.

B. The Company is ordered to formulate objective criteria for the promotion or selection of supervisory personnel. Job descriptions and selection criteria for supervisory positions shall be prepared by the Company for all supervisory positions at the Charlotte plant within thirty (30) days after the entry of this Judgment, which descriptions (a) are intended for informational purposes only, (b) are not intended to indicate all the duties to be performed, and (c) will be used for no other purpose than to inform employees of the general nature of supervisory positions. The Company shall provide counsel for the plaintiff with copies of the job descriptions and criteria for the selection of supervisory personnel, and unless the plaintiff objects to the description and selection criteria within thirty (30) days after receiving said copies, such descriptions and selection criteria shall be deemed to comply with this Order. Copies of the descriptions and

selection criteria shall be posted on bulletin boards located in conspicuous places throughout the Charlotte plant.

C. The Company shall fill vacancies in supervisory positions at the Charlotte plant with females, except when the Company is unable to promote or hire qualified females, until the percentage of females in supervisory positions approximately equals the percentage of females in the Charlotte plant as of August 18, 1972. The Company is not required to fill any supervisory position with a person not qualified for said position nor is the Company required to retain any person in such position, if after a reasonable time, she is unable to perform competently the duties of such position.

VIII. *Back Pay for the Plaintiff.*

The parties agreed during the trial with the consent of the Court to sever for trial purposes the issues of defendant's liability and plaintiff's entitlement to back pay on the one hand, and, on the other hand, the amount of back pay to be awarded to the plaintiff should the Court find in favor of the plaintiff on the entitlement issue. Counsel for the parties are directed to meet and confer within thirty (30) days of the entry of this Order for the purposes of discussing and/or agreeing upon the back pay issues. Absent an agreement among the parties, the parties are directed to disclose and exchange pertinent documents and records relevant to this subject and to submit their respective positions concerning this subject to the Court within forty-five (45) days of the entry of this Order. The Court will thereafter enter an Order on this matter.

IX. *Costs and Attorneys Fees.*

A. The plaintiff be and is hereby awarded her costs in this action including reasonable counsel fees and expenses.

B. Counsel for the parties are directed to meet and confer within thirty (30) days of the date of this Order for the purpose of agreeing upon costs, reasonable attorneys fees and expenses. Absent such an agreement, (1) counsel for the plaintiff is directed to file with the Court a statement of time for which counsel fees are claimed and an itemization of costs and expenses, and (2) the defendant is directed to file a statement with the Court setting forth the basis by which the Company has compensated their counsel and the dollar amount it has paid or expects to pay its counsel in this action. If the parties are unable to agree on costs, counsel fees and expenses, the respective statements required herein, shall be filed with the Court within forty-five (45) days of the entry of this Order.

X. *Records and Reports.*

A. The Company shall maintain appropriate records of all actions taken pursuant to this Order and shall allow counsel for the plaintiff to inspect these records after fifteen (15) days' notice.

B. The Company shall make bi-annual reports to the Court, with copies to counsel for the plaintiffs, the first report being due July 1, 1976, and each six (6) months thereafter for a period of two years, which shall contain:

1. *Supervisory Positions*: (a) a listing of all supervisory vacancies, by title and department which have occurred since the last report; (b) the name, sex and original hire date of the person or employee selected for each supervisory position; (c) current roster showing name,

sex, job title, original hire date and department for supervisory personnel at the Charlotte plant; and (d) the name, sex, job title, department and original hire date of each supervisory employee terminated, demoted, or transferred from the Charlotte plant or from some other plant of facility of the Company to the Charlotte plant.

2. Thirty (30) days prior to the implementation of any new written tests at the Company's Charlotte plant, the Company shall provide the Court and counsel for the plaintiff with copies of the validation study or studies conducted by the Company which demonstrate the newly devised test meets the standards of Paragraph V(A) herein. Plaintiff's counsel will have thirty (30) days to object to the use of the proffered test. Nothing in this Judgment shall prohibit the Company from administering said new tests to incumbent employees for the purpose of preparing a professional validation study so long as the raw data arising from such validation studies are not used to the detriment of incumbent employees.

XI. *Notice.*

The Company shall give notice of this Order to all of its employees at the Charlotte plant by posting copies of this Order on bulletin boards in conspicuous places throughout the plant for a period of ninety (90) days immed'ately following the entry of this Order.

XII. *Rentention of Jurisdiction.*

The Court retains jurisdiction of this matter to issue such other orders and to conduct such other proceedings as may be necessary to effectuate this Order.

This 14 day of October, 1975.

/s/ James B. McMillan
United States District Judge

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-8381

WINIFRED S. NANCE,
Appellee,

vs.

UNION CARBIDE CORPORATION, CONSUMER
PRODUCTS DIVISION, A CORPORATION,
Appellant.

ORDER

(Filed November 10, 1975)

Upon full consideration of Union Carbide Corporation's Motion for Suspension of Injunctions and for Stay of Further Proceedings by the district court including determination of back pay and attorney's fees, and it appearing that the relief sought is necessary to prevent irreparable injury to the Appellant and many of its employees, will maintain the status quo, and will not substantially harm the Appellee or the public interest,

IT IS ORDERED AND ADJUDGED, that the Injunctions of the district court dated October 14, 1975 are hereby suspended and further proceedings in the district court, including determination of back pay and attorney's fees, are hereby stayed pending the disposition of the appeal.

IT IS FURTHER ORDERED that the processing and hearing of this appeal be expedited. The Clerk will establish an expedited schedule for the filing of briefs.

Dated this 7th day of November, 1975.

/s/ Clement E. Haynsworth, Jr.
Chief Judge, Fourth Circuit

APPENDIX D

(Filed July 28, 1976)

Winifred S. NANCE, Appellee,

v.

UNION CARBIDE CORPORATION, CONSUMER
PRODUCTS DIVISION, a corporation, Appellant.

No. 75-2234.

United States Court of Appeals, Fourth Circuit.

Argued Jan. 7, 1976.

Decided July 28, 1976.

As Modified on Denial of Rehearing and Rehearing
En Banc Sept. 23, 1976.

Female employee brought sex discrimination action. The United States District Court for the Western District of North Carolina, James B. McMillan, J., 397 F.Supp. 436, granted both individual and broad class relief. The employer appealed, and the Court of Appeals, Donald Russell, Circuit Judge, held that there was no warrant for treating the suit as anything other than an individual action limited to plaintiff's individual claims; that defendant met any burden that may have rested on it to support its failure to promote plaintiff to supervisory positions; that defendant had not been obliged to validate a new mechanical aptitude test; that plaintiff was entitled to relief to the extent that she had been prejudiced in the computation of her "company service" or seniority rights by discriminatory practices of defendant in the period before the Civil Rights Act

became effective; and that additional relief provided in the District Court's order which went beyond that to which plaintiff was properly entitled was inappropriate.

Remanded.

1. Federal Civil Procedure (Key) 184

Where district court, in employment discrimination action, entered an order on the eve of trial which sustained plaintiff's objections to interrogatories submitted by defendant on the assumption that the suit was brought as and remained an individual and not a class action, possible prejudice to defendant which would result if, thereafter, the action were converted into a class action without notice to defendant made treatment of the action as a class action inequitable. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq., Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

2. Federal Civil Procedure (Key) 184

Despite fact that Title VII actions are often described as "inherently class suits" and that class action requirements must be read liberally in the context of suits brought under Title VII, in order to establish right to proceed as a class representative, plaintiff in such an action must establish that the action meets the statutory class action requirements. Fed.Rules Civ.Proc. rules 23, 23(a), 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

3. Federal Civil Procedure (Key) 184

Employee discrimination suits are not exempt from terms of rule pertaining to prerequisites to a class action. Fed.Rules Civ.Proc. rule 23, 23(a), 28 U.S.C.A.

4. Federal Civil Procedure (Key) 161

Determination of class status is to be made before the decision on the merits. Fed.Rules Civ.Proc. rule 23(c), 28 U.S.C.A.

5. Federal Civil Procedure (Key) 184

Prerogative of designating sex discrimination action as a class action rested entirely with plaintiff. Fed.Rules Civ. Proc. rules 23, 23(a), 23(c), 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

6. Federal Civil Procedure (Key) 184

Defendant, in employment discrimination action, was entitled to rely on plaintiff's positive disclaimers of any intention to proceed by way of a class action and was not obligated to read every interrogatory filed by plaintiff to determine whether it indicated an unexpressed but implied intention on plaintiff's part to disavow her disclaimers and assert right to proceed as a class action and, therefore, even if plaintiff filed broad interrogatories that could be construed as relevant to class action, such interrogatories were not sufficient to put defendant on notice of class action. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

7. Federal Civil Procedure (Key) 184

Even if interrogatories submitted by plaintiff, in sex discrimination action, gave some implied notice that she contemplated a class action, where, on the eve of trial, plaintiff unequivocally represented to the court, in opposition to defendant's interrogatories, that she was not prosecuting a class action and was not seeking class relief, any

implication which might have been drawn from plaintiff's interrogatories would have been nullified. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

8. Federal Civil Procedure (Key) 184

Where, inter alia, sex discrimination plaintiff stipulated and represented on the record that she was not proceeding by way of a class action and where, even on the eve of trial, plaintiff unequivocally represented to the court that she was not prosecuting a class action and was not seeking class relief, it was not appropriate to treat case as anything more than what plaintiff designated it, an individual action limited to plaintiff's individual claim. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

9. Federal Civil Procedure (Key) 184

Where sex discrimination plaintiff failed to amend her complaint to seek class relief and failed to take any steps either in her pleadings or in positions taken during trial to comply with rule pertaining to class certification, and where plaintiff represented to trial court on several occasions that she was not proceeding by way of a class action, plaintiff precluded any class certification in her case. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

10. Civil Rights (Key) 44(5)

Where, inter alia, sex discrimination plaintiff offered no real proof of her qualification for promotion to a supervisory position and did not suggest that she had applied for promotion and where undisputed testimony established

that plaintiff was unable to work amicably with her fellow employees and had been embroiled in difficulties with them, employer met any burden that may have rested on it to support its failure to promote plaintiff. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

11. Civil Rights (Key) 38

Where sex discrimination plaintiff did not in any of her five charges assign as a complaint that she had been discriminated against in not being considered for promotion to a supervisory position, it was questionable whether issue pertaining to such discrimination was properly before the court. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

12. Civil Rights (Key) 9.14

Where new simplified mechanical aptitude test which employer required of all employees seeking to transfer to certain specialized departments after 1970 was passed by a higher percentage of females than of males and where at least one of the specialized departments had more female than male employees, test did not have discriminatory impact on females and there was no obligation on the employer to validate the test. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

13. Civil Rights (Key) 43

Burden of establishing job relatedness of a test arises only after the complaining party or class has made out a prima facie case of discrimination, that is, that the test in question selects applicants for hire or promotion in a discriminatory pattern significantly different from that of the poll of applicants. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

14. Civil Rights (Key) 31

While Equal Employment Opportunity Commission guidelines are not binding on the courts, they are to be given great deference. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

15. Civil Rights (Key) 31

Equal Employment Opportunity Commission guidelines which provide that the validity of new employment tests depends on whether formerly hired employees also qualify under the new tests only when the formerly hired employees were subjected to less stringent selection standards were reasonable, fair and consonant with the purposes of Title VII of the Civil Rights Act of 1964. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

16. Civil Rights (Key) 9.13

Where new mechanical aptitude test which employer required of all persons employed in certain specialized departments after 1970 was less stringent than earlier tests under which older employees had qualified and where the new test had no discriminatory impact, there was no basis for finding that subsequent applicants for employment could not be required to take the new test unless older employees again qualified by taking and passing the new test. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S. C.A. § 2000e et seq.

17. Civil Rights (Key) 2

Even though layoffs occurred before the effective date of Title VII of the Civil Rights Act of 1964, layoffs might violate the Act if they had an adverse effect on an em-

ployee's seniority rights after the Act became effective. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S. C.A. § 2000e et seq.

18. Civil Rights (Key) 9.12

Any seniority system which carried over into period after Civil Rights Act of 1964 became effective the effects of a pre-Act discriminatory job assignment policy which disadvantaged blacks or females in seniority rights is not a "bona fide seniority system" under the Act and must be adjusted to remedy the disadvantage. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

See publication Words and Phrases for other judicial constructions and definitions.

19. Civil Rights (Key) 38

Where, inter alia, employer computed an employee's "company service," for purpose of fixing priority rights of employees in bidding for vacancies in case of layoffs and in qualifying for certain fringe benefits, in terms of the employee's period of employment, less layoffs, and where, prior to effective date of Civil Rights Act of 1964, jobs in certain departments were reserved exclusively for males and during layoffs only males could bid on these jobs, system gave male employee a preferred opportunity to protect his "company service" over female employee and, therefore, to the extent that female complainant was prejudiced thereby in computation of her "company service" or seniority rights, she was entitled to relief. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

20. Civil Rights (Key) 9.14

Assuming that employer imposed no different standard on female than on male employees in requiring that an employee who took a "heavy" job and failed to perform satisfactorily would be fired, there was no impropriety on ground of sex discrimination in the requirement. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

21. Civil Rights (Key) 46

Where, inter alia, sex discrimination plaintiff had several times represented on record that she did not intend to prosecute a class action and where court had limited defendant's discovery on assumption that action was purely an individual suit, it was improper for district court to proceed as if it were dealing with a class action and to enter order which required, inter alia, a general rearrangement of defendant's entire seniority system, as applied to both male and female employees. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

22. Civil Rights (Key) 46

A finding of either racial or sex discrimination in the establishment or operation of a seniority system, even in a class action, requires that such seniority system be modified only as it applies to those employees who were previously subjected to discrimination, only to the extent necessary to remove the elements perpetuating discrimination and only for a limited period of time. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

J. Frank Ogletree, Jr., Greenville, S.C. (H. Lane Dennard, Jr. and Stuart M. Vaughan, Jr., Greenville, S.C., on brief), for appellant.

Robert Belton, Charlotte, N.C. (Jonathan Wallas, Charlotte, N.C., on brief), for appellee, Susan J. Johnson, Atty., EEOC, Washington, D.C. (Abner W. Sibal, Gen. Counsel, Joseph T. Eddins, Associate Gen. Counsel, Beatrice Rosenberg and Charles L. Reishel, Attys., EEOC, Washington, D.C., on brief), as amicus curiae.

Before BUTZNER, RUSSELL and WIDENER, Circuit Judges.

DONALD RUSSELL, Circuit Judge:

This appeal arises out of an action charging sex discrimination in employment rights under Title VII. After trial, the District Court granted both individual and broad class relief. The defendant has appealed. We modify the decree and remand for entry of decree as hereinafter indicated.

The plaintiff is a female employee at the Charlotte, North Carolina battery plant of the defendant. Her employment began in 1952 and has been continuous since, save for layoffs. Following a layoff in January, 1970, she filed with the Equal Employment Opportunity Commission[1] over a period of some eleven months a succession of five charges alleging sex discrimination. All arose basically out of her layoff. Following receipt from the EEOC of a "suit letter," this judicial action was begun, and after trial, resulted in the judgment from which this appeal is taken.[1a]

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1. Hereafter referred to as EEOC.

1a. 397 F.Supp. 436.

A preliminary issue, earnestly pressed by the defendant and briefed by both parties, is whether this action is to be treated as a class action or as an individual action. Concededly it was brought as an individual action.[2] This individual character of the action was not merely affirmed in the complaint as filed, it was so stipulated categorically in the record by the plaintiff herself at an early stage of the proceedings. This stipulation resulted from a motion by the defendant for a more definite statement by the plaintiff, setting forth the persons or class, if any, the plaintiff sought to represent. By this motion the defendant manifestly sought to establish definitely and finally whether the plaintiff intended to make any claim that her action was a class action. The motion was denied by the Court on the express condition "that the plaintiff [would] plead or file stipulations with regard to the class action aspects of the case, indicating more specifically the make-up of the class and the identity of the plaintiffs." By way of answer to such order, the plaintiff filed of record a stipulation to the effect that she did "not contemplate at this time seeking to amend the complaint to allege a class action, however, the plaintiff is of the opinion that whatever benefits she may obtain in this action should inure to the benefit of other similar situated females" at the Charlotte plant.[3]

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2. *See Katz* v. *Carte Blanche Corporation* (3d Cir. 1974) 496 F.2d 747, 760, *cert. denied* 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974):

> "* * * *the plaintiff, not the judicial system,* controls whether or not to ask for class action treatment." (Emphasis added)

3. The latter part of this statement represents, as we understand it, an expression of plaintiff's counsel's opinion that any legal issue decided favorably to the plaintiff in this suit against the defendant may be availed of by way of collateral estoppel in any individual suit instituted or tried subsequently by one asserting the same seniority claim as the plaintiff against the defendant. *Katz* v. *Carte Blanche Corporation, supra,* at 762; *Bradford* v. *Peoples Natural Gas Company* (W.D.Pa.1973) 60 F.R.D. 432, 435.

[1] At no time after the entry of this stipulation did the plaintiff seek to convert her individual action into a class action; she made no motion to amend her complaint to state a class action; she at no point endeavored to declare "specifically the make-up of the class and the identity of the plaintiffs" she would represent as a class representative; in sum, she did nothing thereafter to comply with or satisfy the requirements for both alleging and establishing a right to proceed as a class action under Rule 23. Moreover, in a formal order, entered on January 24, 1974, on the eve of the commencement of trial in March of that year, and some eighteen months after this action was commenced, the District Court sustained the plaintiff's objections to certain interrogatories submitted by the defendant because of, as the Court put it, "representations of Plaintiff's counsel that this suit was brought and remains an individual action and not a class action and that back pay is not sought for, and cannot extend as a result of this suit to anyone other than the named plaintiff."[4] Nor did the District Court ever hold a hearing on class certification under Rule 23 or enter an order of class certification or set forth any definition of class or classes of which plaintiff was declared a representative or make any provision for notice to any identified class, all as contemplated under Rule 23. The issue thus is whether, in these circumstances, and in the face of two express "representations" by the plaintiff to the Court that her action was strictly an individual action, and in the absence of any order of any class

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4. This order creates another difficulty in possibly considering this as a class action. Such order, entered on the eve of trial and circumscribing defendant's right of discovery on the assumption the action was purely an individual one, would put the defendant at a likely disadvantage at trial, if thereafter, without notice to the defendant, the action were converted into a class action. Such possible prejudice under such circumstances to the defendant would make treatment of the action as a class action inequitable.

certification by the Court itself, this action can fairly be declared a class action in compliance with Rule 23.

[2, 3] Despite the fact that Title VII actions often are described as "inherently class suits" and that the requirements of Rule 23 "must be read liberally in the context of suits brought under Title VII and Section 1981,"[5] the plaintiff in such an action, in order to establish the right to proceed as a class representative, "must [like any other plaintiff] establish that the action meets the requirements of Rule 23(a);" employee discrimination suits do not represent exemptions from the terms of such Rule.[6] Rule 23 contemplates that every plaintiff, in order to qualify for class treatment thereunder, will seek "class relief * * * in the complaint,"[7] and in the absence of such an allegation, class treatment is generally considered inappropriate. An express ruling to this effect was made in *Danner* v. *Phillips Petroleum Co.* (5th Cir. 1971) 447 F.2d 159, a case very similar in its facts to the one under review here. In *Danner*, the plaintiff, a female, contended that, under the defendant's seniority practices, female employees were discriminated against in favor of male employees and that, as a result of such discriminatory seniority system, she had been laid off in violation of the terms of Title VII. She, as has the plaintiff here, filed her action under Title VII as an individual action. In holding "that class action relief must be predicated upon a proper class action complaint satisfy-

5. *Rodriguez* v. *East Texas Motor Freight* (5th Cir. 1974) 505 F.2d 40, at 50 (U.S. Appeal Pending).

6. *Ibid.; Senter* v. *General Motors Corp.* (6th Cir. 1976) 532 F.2d 511, 520; *Oatis* v. *Crown Zellerbach Corp.* (5th Cir. 1968) 398 F.2d 496, 499; *Pointer* v. *Sampson* (D.C.D.1974) 62 F.R.D. 689, 696; *Kinsey* v. *Legg, Mason ! Company, Inc.* (D.C.D.1973) 60 F.R.D. 91, 99.

7. *Rodriguez* v. *East Texas Motor Freight, supra,* 505 F.2d at 50.

ing all the requirements of Rule 23,"[8] the Court said, at p. 164:

> "* * * none of the Rule 23 prerequisites have been satisfied. Mrs. Danner sued as an individual plaintiff; she established a prima facie case of sex discrimination against herself by proving that she had been discharged in a plant economy move because she possessed no seniority or bidding rights, and that no women in the plant had such rights. She showed further that the work she was doing was substantially similar to the work of men in the plant who had seniority and bidding rights, and that she was replaced by men who possessed those rights. Mrs. Danner, however, never took up the banner of women's liberation for all the female employees in the Phillips plant. This, of course, does not mean that female employees of Phillips may not take advantage of Mrs. Danner's judicial victory in the future, or, indeed, that they may not join together in a class action against Phillips if they feel one is justified. But if they decide to bring a class action, it must be brought and identified as such, and the predicate for class action relief must be carefully laid. In the meantime, Mrs. Danner's victory is for her alone to taste and enjoy."

[4] A similar result was reached in *Washington* v. *Safeway Corporation* (10th Cir. 1972) 467 F.2d 945, 947, and by us in *Carracter* v. *Morgan* (4th Cir. 1973) 491 F.2d 458, 459. In fact, in the latter case, the plaintiffs had indicated in their complaint that they were suing both individually and as representatives of a class but, in the absence of any certification or identification of the class before a

8. 447 F.2d at 164, n. 10.

decision on the merits,[9] it was held that class treatment was inappropriate, the Court stating:

> "Because of plaintiffs' failure to bring to the attention of the trial court, at any time, the matter of the determination of whether the action would be maintained as a class action, and also because of lack of notice to any class of the proposed final order, we are of opinion that the district court was correct in its actions and the opinion below ought to be affirmed. No determination was ever made at any time that the action be maintained as a class action. F.R.Civ.P. 23(c)(1). No notice was ever given. F.R.Civ.P. 23(e)."[10]

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9. The language of Rule 23(c) makes it quite clear that the determination of class status is to be made "before the decision on the merits." *See Peritz* v. *Liberty Loan Corporation* (7th Cir. 1975) 523 F.2d 349, 354; *cf. Indianapolis School Comm'rs* v. *Jacobs* (1975) 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74, and *Jimenez* v. *Weinberger* (7th Cir. 1975) 523 F.2d 689, U.S. Appeal Pending.

10. The reasoning in *Carracter* is confirmed substantially, it would seem, by the later decision in *Indianapolis School Comm'rs* v. *Jacobs* (1975) 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74. In that case the action was clearly declared a class action in the complaint but no order was entered certifying it as a class action. The plaintiff prevailed both in the District Court and in the Court of Appeals as if on a class action but, during oral argument in the Supreme Court, it developed that the action was moot as to the individual plaintiff. Since, in the absence of actual certification as a class action, the action remained, in the opinion of the Court, but an individual action, the mootness of the individual claim rendered the case subject to dismissal. The Supreme Court accordingly vacated the judgment, stating at p. 130, 95 S.Ct. at p. 850:

> "* * * Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint."

In *Franks* v. *Bowman Transportation Company, Inc.* (1976) ..... U.S. ....., ..., n. 6, 96 S.Ct. 1251, 47 L.Ed.2d 444, ..., n. 6, the Court explained the ruling in *Jacobs*, decided a few weeks ago, thus:

(Footnote continued on following page)

Nor do *Senter* v. *General Motors Corp., supra,* and *Bing* v. *Roadway Express, Inc.* (5th Cir. 1973) 485 F.2d 441, relied on by the plaintiff in support of the class relief granted herein by the District Court, support her contention. In *Senter,* the Court at the outset emphasized that there was "no question but that the suit [involved there] was filed as a class action and it proceeded to trial as a class action" and then added that "Appellant [had] identified the suit as a class action in his opening remarks at trial and Appellee [had] responded by freely admitting that the suit had been filed as a class action." In that context, where, as the Court went on to comment, "all the parties [had] proceeded on the assumption that the action was a class action," the Court concluded, citing *Bing* v. *Roadway Express, Inc.* (5th Cir. 1973) 485 F.2d 441, 446-47, that the action was not improperly treated as a class action.[11] *Bing,* in its pertinent facts and ruling, was not substantially different from *Senter.* In *Bing,* "[i]t was apparent," the Court said, "from the beginning that Bing intended his suit to be a class action;" he had clearly *proclaimed it as such in his complaint;* and, "all parties to the action knew [throughout trial] of its class nature and acquiesced in it."[12] These factual differences—the treatment as a class action from the filing of the complaint throughout the proceedings with the knowledge and "acquiescence" of all parties—were the circumstances which

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"In *Board of School Commissioners* v. *Jacobs, supra,* the named plaintiffs no longer possessed a personal stake in the outcome at the time the case reached this Court for review. As the action had not been properly certified as a class action by the District Court, we held it moot."

11. *U. S.* v. *Tarter,* 522 F.2d 520 at 521-22.

12. 485 F.2d at 446.

distinguished *Bing* and *Senter* from *Danner*.[13] They are similarly distinguishable from this case.

[5-7] The plaintiff contends, however, that because she filed broad interrogatories that could be construed as relevant to a class action, the defendant was given proper notice that the plaintiff intended to proceed as a class action, and that, though no motion for certification was ever made or an order granting certification entered, the defendant was put on notice that plaintiff was proceeding by way of a class action. To accept such an argument would make a nullity of Rule 23 and the procedure it mandates. Moreover, the plaintiff had stipulated and entered representations on the record, not once but twice, as we have already said, that she was not proceeding by way of a class action. She had unequivocally declared in such record that if she intended her action to be a class action, she would amend her complaint to evidence such intention.[14] She at no time made such a motion to amend. Entitled to rely on the plaintiff's positive disclaimers of any intention to proceed by way of a class action—disclaimers appearing in formal representations to the Court—the defendant was not obligated to read every interrogatory filed by the plaintiff to determine whether it indicated an unexpressed but implied intention on the part of the plaintiff to disavow her previous disclaimers and to assert a right to

13. The distinction between *Bing* and *Danner* was restated in the subsequent case of *Rodriquez* v. *East Texas Motor Freight*, *supra*, where Judge Wisdom, after stating that, "[w]hen class relief is sought in the complaint, * * * the court should liberally apply the requirements of Rule 23(a)," explained *Danner* as holding

> " 'that class action relief must be predicated upon a proper class action complaint satisfying all the requirements of Rule 23'." 505 F.2d at 50 and n. 11.

14. The prerogative of designating the action as a class action rested entirely with the plaintiff, *see* note 2.

proceed as a class action. Furthermore, we do not perceive in the interrogatories any unmistakable sign or notice that the plaintiff contemplated a class action.[15] And this is particularly so, since, even on the eve of trial, the plaintiff was representing unequivocally to the Court, in opposition to defendant's interrogatories, that she was not prosecuting a class action and was not seeking class relief, and the District Court, in reliance on that representation, had entered its order of January 24, 1974, denying in part defendant's right to answers to its interrogatories. Even if it could be thought that plaintiff's interrogatories gave some implied notice that she sought class relief, that implication would have been nullified by the representation made to the trial court, as stated in the order of January 24.

[8, 9] On this record, then, we find no warrant for treating this case as anything more than what the plaintiff herself has designated it, to wit, an individual action, limited as it is to plaintiff's individual claim or claims. It is perhaps not too much to add that, by failing to amend her complaint to seek class relief, and by failing to take any steps either in her pleadings or in positions taken during trial, to comply with Rule 23, and by her several representations to the trial court, the plaintiff herself has "precluded any class certification in this case."[16]

The real issue in this case is accordingly the validity of plaintiff's individual claim. In that connection, it should be noted that the plaintiff's claim revolves basically around her "company service" status, the computation of which resulted, she alleged, in her layoff in 1970. It was this layoff that precipitated her initial complaint to the EEOC,

15. Those interrogatories had at least some peripheral connection with the plaintiff's individual charges.

16. *Peritz* v. *Liberty Loan Corporation* (7th Cir. 1975) 523 F.2d 349 at 354.

and it was this layoff which was the sole claim stated by the plaintiff in the first four charges she filed with the EEOC—as a matter of fact, it was not until some eleven months after the filing of her initial charge that she raised any other claim or claims. Nor was the trial judge apparently impressed at trial with these additional claims, belatedly set up by the plaintiff in her fifth amended charge. In a joint letter to counsel for the parties, the trial judge indicated his proposed disposition of the case and, incident thereto, he requested counsel for the plaintiff to "draft proposed findings of fact in brief form" dealing exclusively with loss of seniority "before 1965" and "what methods may be possible to remedy any residual effects of such loss of seniority, if the court finds such loss to have occurred," and requested counsel for the defendant in turn "to prepare proposed findings of fact in favor of the defendant[s] on all of the separate issues that were raised at the trial which do not have to do with the single issue of loss of seniority."[17] It must be assumed from his statements in this letter that the trial judge found that, so far as her individual claim was concerned, the plaintiff was only "aggrieved" by her loss of seniority status, and he intended to limit her relief to this single specific claim of discrimination. The testimony at trial, it is true, had churned up some other issues, issues not concerned with broad, continuing sex discrimination on defendant's part, but issues involving practices long since abandoned by the defendant. These additional issues, the trial court seemingly regarded as wanting in substance, according to his joint letter to counsel to which we have previously referred. Since, however, both parties have devoted some parts of their

17. Some days later the trial judge wrote that there "is probably evidence which would suggest a change in past or in existing practices about posting or not posting notices of vacancies and available promotions."

argument to these other issues, we shall briefly discuss them.

The first of these additional claims dealt with the weight and hours-of-labor qualifications for certain jobs in defendant's plant. These qualifications are invalid under the Act, according to the plaintiff's contention. The defendant does not seriously argue otherwise.[18] Any layoffs suffered by the plaintiff because of the unavailability of certain jobs for bidding by her occurred in the pre-Act period. These restrictions, however, had no adverse effect on the plaintiff and her seniority rights. Continuously

18. Following the enactment of Title VII and in anticipation of its effective date, the defendant, according to the record, sought to amend its employment rules to conform. There was uncertainty at the time even on the part of the EEOC itself whether Title VII overrode state weight and hours-of-labor statutes regulating the employment of females. There was a general feeling, shared at least tentatively by the EEOC, that Title VII did not invalidate such laws. The weight and hours-of-labor regulations adopted by the defendant and inaugurated, it was asserted, represented the defendant's attempt to satisfy the requirements of both the federal and state law. There was some inconsistency, however, because the defendant operated plants in both Ohio and North Carolina; and it sought, according to its contention, to develop regulations which would comply with the laws of either state and thus to have uniform employment rules in all plants. These rules so adopted were thought to comply with the formal guidelines or regulations issued in 1965 by the EEOC itself, which specifically provided that "restrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is set at an unreasonably low level which could not endanger women; and that hours-of-labor statutes would be considered ordinarily "as a basis for application of the bona fide occupational qualification exception." 29 C.F.R. § 1604.1(c). In late 1968, however, the EEOC reversed its position on these two points and it was because of this change in the position of EEOC and the decision in *Bowe* v. *Colgate-Palmolive Company* (7th Cir. 1969) 416 F.2d 711, that the defendant claims it abandoned in 1969 its employment rules on weight and hours-of-work requirements for female employees. The changes in the regulations of the EEOC between 1965 and late 1968 are fully discussed in Note, 61 Cornell L.Rev. 460 at 465-7 (1976); *Williams* v. *General Foods Corp.* (7th Cir. 1974) 492 F.2d 399, 402-3; *Kober* v. *Westinghouse Electric Corporation* (3d Cir. 1973) 480 F.2d 240, 243-5; *Vogel* v. *Trans World Airlines* (M.D.Mo.1970) 346 F.Supp. 805, 809-11. *See, also,* § 2000e-12, 42 U.S.C.

from the effective date of the Act until her layoff in January, 1970, she was employed, suffering no layoffs and earning an uninterrupted "company service" record for such period in the computation of her seniority and fringe benefit rights.[19] Moreover, all designations of any such jobs as male jobs and all weight qualifications therefor were discontinued entirely early in 1969, after the opinion in *Bowe* v. *Colgate-Palmolive Company* (7th Cir. 1969) 416 F.2d 711, and the change in the regulations by the EEOC and before plaintiff's layoff in January, 1970. Nor is there the slightest suggestion in the record or reason to believe that there is any threat that such qualifications, abandoned by the defendant in 1969, will be reinstituted. In fact, as the evidence clearly reveals, the defendant has been attentive to any changes in either the regulations or the construction of the law and alert to conform its practices to such changes.

[10, 11] The plaintiff made some point, too, that she had not been considered for promotion to a supervisory position. She offered no real proof of her qualification for such promotion nor did she suggest in her testimony that she had ever applied for promotion. Such evidence as there is in the record on this point is represented by the explanation offered by the defendant why the plaintiff had not been given consideration for a supervisory position. This explanation consisted of undisputed testimony, concurred in by the plaintiff herself, that the plaintiff was unable to work amicably with her fellow employees and had been embroiled in difficulties with them. This was a perfectly

19. There is another reason for finding this claim without merit. At the time of her layoff in January, 1970, the plaintiff was offered a substantial number of "heavy" jobs. She refused and refused by her own explanation because she doubted her ability to perform these jobs. It would thus appear unlikely that, had a "heavy" job been open to her between 1965 and 1970, the plaintiff would have accepted one.

valid reason for not considering plaintiff for a supervisory position. There is nothing in the record that would justify an inference that the reason was pretensive or pretextual; nor did the trial court find that it was pretensive. The defendant accordingly met any burden that may have rested on it for sustaining its failure to promote the plaintiff. *Cf., McDonnell Douglas Corp.* v. *Green* (1973) 411 U.S. 792, 803-4, 93 S.Ct. 1817, 36 L.Ed.2d 668. Nor did the plaintiff apparently consider that she had been treated unfairly or discriminately in this particular, for she did not in any one of her five charges assign this as a complaint. It is highly questionable under these circumstances that this issue was properly before the court.[20] We have recently held that a suit under Title VII "may encompass only the 'discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge.'" *King* v. *Seaboard Coast Line Railroad Company* (4th Cir. 1976) 538 F.2d 581, 583 (decided April 29, 1976).

[12-16] The final peripheral issue concerns a test required by the defendant of employees seeking certain specialized work in three departments at defendant's plant. This test was inaugurated in 1970. Until 1970 all persons employed in these departments were required to take two other tests. These earlier tests, however, were discontinued

20. In *Oatis* v. *Crown Zellerbach Corp.* (5th Cir. 1968) 398 F.2d 496, 499, the Court said:

> "We thus hold that a class action is permissible under Title VII of the Civil Rights Act of 1964 within the following limits. First, the class action must, as it does here, meet the requirements of Rule 23(a) and (b)(2). Next, the issues that may be raised by plaintiff in such a class action are those issues that he has standing to raise (i. e., the issues as to which he is aggrieved, see § 706(a), supra), and that he has raised in the charge filed with the EEOC pursuant to § 706(a)."

See, also, Equal Employment Opportunity Commission v. *General Electric Company* (4th Cir. 1976) 532 F.2d 359.

in 1970 in favor of a new simplified mechanical aptitude test. This new test, which was required of all employees seeking to transfer to these departments after 1970, did not have any "discriminatory impact" on female applicants; on the contrary, the testimony shows that percentagewise more females passed the test than males. And at the time of trial the employees in at least one of these departments had more female employees than male employees. In that situation, there was no obligation on the defendant to validate this new test. The burden of establishing the job-relatedness of a test arises "only after the complaining party or class has made out a prima facie case of discrimination—has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody* (1975) 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280.[21] The trial court, however, found the new test improper because the then existing employees in

21. This was recognized by the trial court, which, in a colloquy with plaintiff's counsel, stated that "unless the test as administered shows that women flunk more than men, there is no question presented about the testing." *See, also,* Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws,* 82 *Harv.L.Rev.* 1598, 1659. The authors add (p. 1660):

> "Psychologists have criticized this test by claiming that it will not predict job performance, but there is evidence that the criticism may be inaccurate. More important, this criticism is not relevant to the equal employment issue. So long as the test does not prefer whites over blacks or any other protected minority group, it does not violate equal employment requirements. If an employer hired every fifth applicant on a random basis, his selection procedure would be arbitrary and might not relate well to job performance, but it would not deny equal employment opportunity * * *."

This is so because the Act itself very specifically declares that a party is only entitled to relief if his discharge or layoff or loss of any right was because of "discrimination on account of race, color, religion, sex, or national origin * * *." § 2000e-5(g), 42 U.S.C.

Cf., Washington v. *Davis* (1976) ..... U.S. ....., 96 S.Ct. 2040, 48 L.Ed.2d 597, for comparison of rule under due process and under Title VII.

those departments had not been required, as a condition of retaining their jobs, to take the new, less exacting tests. If the existing employees had been given their jobs without any testing or after taking less "stringent" tests, we would find this argument appealing, but all these employees had secured their positions after successfully completing two tests, considerably more exacting and broader in scope than the test presently required (i. e., the simplified mechanical test). It would obviously be unfair to impose on these employees, who had qualified for their jobs by taking both the Modified Alpha and Bennett Mechanical Tests, to condition their continued right to their jobs on their taking the new simplified mechanical test. Nor do the guidelines established by the EEOC require such unfair treatment. These guidelines expressly provide that only when older employees have "qualif[ied] under less stringent selection standards [as] previously enforced" will the validity of the new tests depend on whether these older employees have qualified under the new tests. 29 C.F.R. § 1607.11. Such guidelines, while not binding on the courts, are to be given great deference.[22] We find them reasonable and fair and consonant with the purposes of Title VII *et seq.* Since obviously the new test was "less stringent" than the earlier tests, under which these employees qualified for their jobs, there was no basis in the record for holding that unless such employees again qualified by taking the new test, no subsequent applicant for employment on such jobs could be required to take the new test, which admittedly had no discriminatory impact.

We come now to the plaintiff's individual claim that the layoff in 1970 resulted from an improper deduction in

22. *Griggs* v. *Duke Power Co.* (1971) 401 U.S. 424, 433-4, 91 S.Ct. 849, 28 L.Ed.2d 158.

her "company service" record of time lost due to alleged sex-discriminatory layoffs in the pre-Act period of her employment. Under the defendant's seniority system, "company service" is an employee's period of employment, less layoffs. Such "company service" fixes the priority rights of employees in bidding for other job vacancies in cases of layoff and in qualifying for certain fringe benefits. It is obviously of great value to an employee;[23] it has been well characterized as an employee's "personal investment in a job."[24] Plaintiff's claim is that the defendant, by following a discriminatory practice of limiting female employment to certain job classifications, narrowed the opportunity of its female employees to bid on an equal basis with male employees for job vacancies in the plant, thereby causing a female employee to suffer generally more layoff time than a comparably qualified male employee. To illustrate the effect of such practice in her case, she points out that she suffered five layoffs between 1952 and July 2, 1965, whereas males employed subsequent to the plaintiff suffered no layoff time prior to January, 1970. These layoffs of the plaintiff changed the beginning date of her "company service" from 1952 to 1955, and it was this latter date she was required to use in bidding for job vacancies.

[17-19] The defendant does not dispute the method of calculating "company service" as claimed by the plaintiff. It does suggest that all of plaintiff's layoffs prior to January, 1970, took place before July 2, 1965, the effective date of Title VII and that such layoffs, whether discriminatory or not, were not illegal at the time. It does not follow,

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23. For a pertinent statement of the importance of such standing, *see Franks* v. *Bowman Transportation Co., Inc., supra*, ... U.S. ....., at pp. .....- ....., 96 S.Ct. 1251, 1264-1266.

24. Note, *Remedies: Retroactive Seniority—The Courts as Personnel Director*, 29 Okl.L.Rev. 215 (1976).

however, that, though they occurred before the effective date of the Act, these layoffs may not result in a violation of the Act if they have an adverse effect on the employee's seniority rights after the Act became effective. The bellwether authority in this area is the oft-cited case of *Quarles* v. *Philip Morris, Incorporated* (E.D.Va.1968) 279 F.Supp. 505, 517-8. That case held (a) that only a *bona fide* seniority system was protected under the Act, (b) that "one characteristic of a *bona fide* seniority system must be lack of discrimination," and (c) that a seniority system, however neutral facially, is not a *bona fide* seniority system if it "has its genesis in racial [or sex] discrimination," whether pre-Act or post-Act.[25] Accordingly, *Quarles* established that any seniority system which carried over into the post-Act period the effects of a pre-Act discriminatory job assignment policy disadvantaging a black [or a female] in seniority rights was not a *bona fide* seniority system under the Act and had to be adjusted to remedy that disadvantage. This decision has been consistently followed by this Circuit[26] and its ruling has been adopted in repeated decisions of other Circuits since[27] and has been approved by

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25. *Ibid.*, 517.

26. *United States* v. *Chesapeake and Ohio Railway Company* (4th Cir. 1972) 471 F.2d 582, 587-8, *cert. denied* 411 U.S. 939, 93 S.Ct. 1893, 36 L.Ed.2d 401 (1973); *Brown* v. *Gaston County Dyeing Machine Company* (4th Cir. 1972) 457 F.2d 1377, 1382, *cert. denied* 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972); *Robinson* v. *Lorillard Corporation* (4th Cir. 1971) 444 F.2d 791, 795, *cert. dismissed* 404 U.S. 1006, 1007, 92 S.Ct. 573, 30 L.Ed.2d 655; *United States* v. *Dillon Supply Company* (4th Cir. 1970) 420 F.2d 800, 803-4; *United States* v. *Continental Can Company* (E.D. Va.1970) 319 F.Supp. 161, 166.

27. *United States* v. *T.I.M.E.-D.C.* (5th Cir. 1975) 517 F.2d 299, 315, U.S. Appeal Pending; *United States* v. *Navajo Freight Lines* (9th Cir. 1975) 525 F.2d 1318, 1324-25; *Pettway* v. *American Cast Iron Pipe Company* (5th Cir. 1974) 494 F.2d 211, 224; *United States* v. *N. L. Industries, Inc.* (8th Cir. 1973) 479 F.2d 354,

(Footnote continued on following page)

the legal writers.[28] It is conceded by the defendant that in the pre-Act period, the jobs in certain departments were reserved exclusively for male employees and that in periods of layoff only qualified male employees could bid on the jobs in these departments. Such a system obviously gave the male employee a preferred opportunity to protect his "company service" over the female employee. This more extensive opportunity in bidding for vacancies during layoffs on the part of male employees was a discrimination against female employees, and because that discrimination was carried over in the operation of the post-Act seniority system it tainted such post-Act system. To such extent as the plaintiff was prejudiced thereby in the computation of her "company service" or seniority rights, she is entitled to relief. This the District Court correctly concluded.

[20-22] The plaintiff is accordingly entitled to a judgment requiring an adjustment in her "company service" status sufficient to remove the adverse effect of any pre-Act discriminatory layoffs. The District Court left for further determination the extent of such adjustment and the plain-

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(Continued from previous page)

360-1, where many of the authorities are cited; *United States* v. *International Bro. of Elect. Wkrs., L.No. 38* (6th Cir. 1970) 428 F.2d 144, 150, *cert. denied* 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); *Jones* v. *Lee Way Motor Freight, Inc.* (10th Cir. 1970) 431 F.2d 245, 248, *cert. denied* 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971); *United States* v. *Bethlehem Steel Corporation* (2d Cir. 1971) 446 F.2d 652, 660-1; *Schaefer* v. *Tannian* (E.D. Mich.1975) 394 F.Supp. 1136, 1142. *Cf. however, Jersey Cen. Pow. & Lt. Co.* v. *Local Un. 327, etc. of I.B.E.W.* (3d Cir. 1975) 508 F.2d 687, 706-7, U.S. Appeal Pending; and *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.* (7th Cir. 1974) 502 F.2d 1309, 1319-20, U.S. Appeal Pending.

28. *See*, Cooper & Sobol, *supra*, at p. 1617 *et seq.*; and Sheeran, *Title VII and Layoffs Under "Last Hired, First Fired" Seniority Rule*, 26 *Case West.Res.L.Rev.* 409, 449 *et seq.* (1976).

tiff's right, if any, to back pay.[29] The District Court, however, did not confine its ruling to plaintiff's individual claims, but proceeded as if it were dealing with a class action, despite the representations in the record and the limitation in discovery imposed on the defendant by the ruling that the action was purely an individual suit, to grant relief which required a general re-arrangement of the defendant's entire seniority system, *as applied to both male and female employees,* including new rules for determining vacancies and supervisory promotions, even though it is well settled that a finding of either racial or sex discrimination in the establishment or operation of a seniority system, even in a class action, requires that such seniority system "be modified only as it applies to those employees who were previously subjected to discrimination, only to the

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29. At the time of her layoff in 1970 and again in 1973, the plaintiff had been offered a large number of jobs in the plant, some of them at least being jobs theretofore classified as "heavy" jobs. She refused all such proffers. She would justify her refusal of those which might be classified as "heavy" on the ground that she was told that, if she chose one of such jobs and was unable to do the job, she would be "fired." We have been pointed to no evidence where she justified her refusal of the offer of those jobs which were not classified as "heavy." So far as the rule with reference to "heavy" jobs of which she complained it did not appear to be disputed that the rule, both for male and female employees, was that an employee who took such a job and failed to perform satisfactorily would be fired. In imposing such a standard on the plaintiff in connection with her right to bid for so-called "heavy" jobs, the defendant was imposing no different standard than that it imposed on male employees. *See Williams* v. *American Saint Gobain Corp., Okmulgee, Okl.* (10th Cir. 1971) 447 F.2d 561, 568. Assuming this to be true, there would seem to be no impropriety on grounds of sex discrimination in the requirement, the exaction of which the plaintiff claims as an excuse for refusing these job offers. Whether such offers of other jobs, some "heavy" and some not, operated as a bar to a right to back pay we leave, as we have said, to further proceedings in the District Court. See § 2000e-5(g), 42 U.S.C.: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. * * *" *See, also, Williams* v. *American Saint Gobain Corp.* at pp. 567-8, and *United States* v. *Bethlehem Steel Corporation* (2d Cir. 1971) 446 F.2d 652, 665-6.

extent necessary to remove the elements perpetuating that discrimination, and only for a limited period of time. Such a system should be allowed to apply unabated to all employees, black and white, against whom the employer did not discriminate." *Stevenson* v. *International Paper Co., Mobile, Alabama* (5th Cir. 1975) 516 F.2d 103, 118.[30] The additional relief provided in the District Court's order, going beyond that to which plaintiff was properly entitled, was inappropriate and the order of the District Court should be modified to eliminate such provisions and terms. What we have said would apply to the inappropriate injunction against weight and hours-of-work rules of the defendant, such rules having been abandoned in 1969 and there being no reasonable basis to assume that they will ever be reinstituted.

The judgment below should accordingly be modified to include relief only in plaintiff's seniority rights as represented by the calculation of her "company service" records to such extent as she may show she was prejudiced as a result of defendant's policy of reserving certain jobs for male employees in the pre-Act period, and all other relief granted in the order of the District Court herein, should be vacated, other than a recognition of the right of the plaintiff to costs and an award of attorneys' fees. The cause is accordingly remanded for the entry of a decree in accordance with the foregoing and for such other proceedings as may be consistent herewith.

REMANDED FOR ENTRY OF DECREE IN ACCORDANCE WITH FOREGOING.

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30. This conclusion is supported by the recent case of *Franks* v. *Bowman Transportation Company, Inc., supra,* ..... U.S. ....., ..., 96 S.Ct. 1251, 47 L.Ed.2d 444, where the Supreme Court contrued Title VII to allow seniority relief, in a class action, only for identifiable victims of the illegal hiring discrimination.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-2234

Winifred S. Nance,
Appellee,
-versus-
Union Carbide Corporation, etc.,
Appellant.

OPINION AND ORDER ON PETITION FOR REHEARING

(Filed September 23, 1976)

(Decided: Sept. 23, 1976)

RUSSELL, CIRCUIT JUDGE:

Upon consideration of the petition for rehearing by the appellee, it is

ORDERED, that the first six lines, and the words "After all" on line 7, of footnote 29, on page 30 of the Slip Opinion be deleted; and that the following: "as well as her formal representation that she did not seek back pay," appearing in the first and second lines of the same footnote 29 on page 31 of the Slip Opinion, be deleted. The original opinion is reaffirmed in all other respects, and

The suggestion for *en banc* consideration fails, no judge having asked that the court be polled.

APPENDIX F

STATUTES INVOLVED

Section 703 (a), (h), and (j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a), (h), and (j):

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon

the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.